UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF NEW YORK

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UTICA MUTUAL INSURANCE COMPANY, *

Plaintiff, *

-v- 15-cv-270 *

R&Q REINSURANCE COMPANY, *

Defendant. *

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TRANSCRIPT OF TELECONFERENCE
BEFORE THE HONORABLE ANDREW T. BAXTER
May 1, 2017
445 Broadway, Albany, New York

FOR THE PLAINTIFF (via teleconference):

SIMPSON, THACHER & BARTLETT, LLP.
425 Lexington Avenue
New York, New York 10017
By: Christopher G. Lee, Esq.
Elisa Alcabes, Esq.

FOR THE DEFENDANT (via teleconference):

CHADBOURNE & PARK, LLP.
1301 Avenue of the Americas
New York, New York 10019
By: John F. Finnegan, Esq.
Allison G. Gold, Esq.

THE COURT: Good afternoon. This is Judge Baxter. This is Utica Mutual Insurance Company versus R&Q Reinsurance, 6:15-cv-270. Could we please have appearances for the plaintiff, please.

MR. LEE: This is Chris Lee from Simpson, Thacher & Bartlett on behalf of Utica.

MS. ALCABES: And Elisa Alcabes on behalf of Utica for Thacher.

THE COURT: All right. For the defendant?

MR. FINNEGAN: John Finnegan and Allison Gold from Chadbourne and Parke.

THE COURT: Okay. R&Q has filed a motion to compel further responses to its set of 256 requests for admissions and the disclosure of documents relating to recent and ongoing settlement discussions between Utica Mutual and Burnham regarding coverage issues; that motion is docket number 109. Utica has opposed the motion to compel at docket numbers 116 and 117.

We do have a court reporter today but she is appearing by phone from Albany, so please try and identify yourselves when speaking, at least the first couple of times, and try to avoid talking over each other and I have given Lisa Tennyson, our court reporter, leave to interrupt as necessary to make sure she gets a good transcript.

Before delving into the disputed requests for admissions, I'm going to address, first, the other issues raised in R&Q's motion to compel. In particular, the request for documents relating to two subjects, first, Utica and Burnham's ongoing discussions of coverage issues and a potential settlement thereof and, secondly, Utica and Resolutes internal evaluation of coverages coverage issues and the terms of a possible settlement. Those two topics are set forth in R&Q's brief at page 3, docket 109-18.

In response to this Court's guidance at the February 14th discovery Utica agreed, and I'm quoting now, "Agreed to produce documents sought by R&Q that the Court suggested were fair game. I emailed communications between Utica and Burnham that post-date the complaint and relate to coverage issues and any potential settlement," closed quote. That's from Utica's brief, page 2, docket 116.

Utica contends, however, that R&Q's document request overreaches and demanding production of internal Utica Resolute documents generated after this lawsuit was filed, that's the position set forth in Utica's letter brief at page 2, 11 to 13.

Keeping in mind that I have read your papers, I will hear from each side briefly any new developments

or supplemental arguments starting with R&Q.

MR. FINNEGAN: Thank you, your Honor. I'd like to begin by -- by --

THE COURT: This is -- this is Mr. Finnegan?

MR. FINNEGAN: I apologize. I should have identified myself for the court reporter. I guess I'm not listening as well I should have.

I'd like to first begin by addressing some of the comments made by Utica in its opposition papers. For example, at page 11 Utica contends that it's fully satisfied R&Q's requests for additional documents. Obviously that's -- that statement can't possibly be true, otherwise, we wouldn't be here.

I also found it somewhat puzzling. In its papers Utica attached a March 8th, 2007, email from Mr. Lee to us without attaching the subsequent emails that were appended by R&Q as part of its papers as Exhibit 13 and I've -- you know, they go on and they criticize. As I understand it, a lot of these are extraneous comments and doesn't get to the crux of it but since there was so many of them littered in the papers, I thought it was important, particularly given the brevity of their papers, to point out that -- that many of the statements they made are just flatly absurd.

They attack us and criticize us for stating,

in substance, that remained a dispute and they say that we didn't tell the Court that the dispute had been narrowed. In point of fact, if you look at page 24 of our brief, we began by saying that the dispute had been narrowed and only two requests remained in controversy.

Now, turning to the crux of the controversy, as the Court's probably already figured out, the parties radically disagree about what guidance you gave us at the February 14th conference and, if I can, I'd like to begin by reading a passage from page 87 of the February 14th conference where you said, in part, in terms of updating the last two years of discovery, I think you've got an obligation to do that anyway and then, talking to Utica, saying to the extent that there's been supplemented developments, you can't now start parsing which documents you're going to give us and not.

The next sentence is where the parties diverge. You go on to say, if you're saying the post-litigation work product, you know, most of what you're going to do after the complaint is filed, is going to be communicated with the client, and I emphasize those words, with the client, that work products are privileged.

We're not seeking any of Utica's communications with Simpson, Thacher. We're not seeking

any of Resolute's communications with Simpson, Thacher.

What we're seeking are the documents wherein Resolute and Utica, between and amongst themselves or individually, considered what terms are we going to suggest to Burnham for resolving this. Why -- how did we decide, for example, that we would bill them in February 2016 for $20 million? Why did we decide to contain -- put certain terms into a term sheet?

And based on the limited documents I have where they have shown me what they have sent to Burnham, I know for a fact that they revised the initial terms sheet because it makes reference to a paragraph 7 and the only way you can understand the -- the context of paragraph 7 is to realize that it's -- they took something out because what -- what's meant in paragraph 7, the subject matter actually is now in paragraph 6.

So there's a lot of -- of stuff that we would want to obtain and what I think is most interesting, you don't find anywhere in their opposition papers that they're suggesting that any of the materials are indeed work product, they seize on your words, where you put forth a conditional statement and say, all right, well, now we don't have to produce anything. But Your Honor never said you don't have to produce internal communications. You only said you may not have to

produce that which is privileged and there's a vast difference and going to that point generally, unless I get an order directing them to produce materials, then I'm not even entitled to know what it is that they're withholding from me on the basis of privilege, so I think, at a bear minimum, the Court would need to order them to produce all internal communications, and insofar as they believe that one or more of them is subject either to privilege or work --

THE COURT: Mr. Finnegan? He's probably talking with his hands. Hit the wrong button. We will give him a minute to reconnect.

(Pause in proceeding, 1:10 P.M.)

THE COURT: Okay. Mr. Finnegan, you had the floor. I'm not sure you know where you got cutoff but you probably were arguing for ten minutes after --

MR. FINNEGAN: That may well be. Can I impose upon Ms. Tennyson to give me a sense of what the last words that she was able to get from me.

(Record read by court reporter)

MR. FINNEGAN: Okay. If they were subject to privilege or work product, they would then need to put them on a log, the parties obviously would have the opportunity then to discuss whether or not any of those assertions were subject to challenge, and then if we

couldn't work it out between ourselves, we would bring it to the Court. Since I just got some interference, is everybody still there before I -- because the --

THE COURT: I am.

MR. FINNEGAN: Okay. And I think what I -- and you'll have to forgive me because I -- I take notes but then I don't follow my notes. I just go off on -- on a rip and I'm not sure if I said it before or not, but if you read their papers, they don't actually assert in their papers that any of these documents are privileged nor do they assert that they fall under the work product, and I don't believe that they did so because it would be patently unreasonable to assert that every internal communication was somehow related to -- the vast majority of their internal communications are going to relate to how to deal with Burnham and what terms to put into the potential settlement with Burnham. All of those would not be subject to privilege.

And in the May 14th conference, this Court began -- and I believe it's at page 9 -- by asking Utica whether or not it was taking the position that coverage counsel and coverage advice was privileged and they said no, no, no, they've never taken that position. We always produced those documents and they were right to do so because the only thing that they were asserting

privilege on would be communications related very specifically to reinsurance and it would also be facially ridiculous to take the position that every document created after the filing of the lawsuit somehow is infused with work product. It can't possibly be that since Simpson, Thacher was involved in every single communication and any of it -- we're not asking for those.

THE COURT: Let me interject here for just a minute. You're talking about work product. Work product does not require necessarily the involvement of counsel. Right? I mean, you're -- you're talking in most of these cases, and I -- it's gotten to where I have done so many of these discovery conferences and so many different Utica cases that I'm not necessarily -- have perfect recollection of prior rulings or prior discussions, but in most of these cases, it seems to me the parties understand that their post-filing internal communications are likely to be substantially different and affected by the ongoing litigation, and so this typically has not required each other or each side to log their post-complaint internal discussions, even though they may relate to the lawsuit and, you know, I get that the, you know, the privilege with respect to coverage below the level of reinsurance has generally

been waived by Utica in this and other litigation but it seems fairly clear to me that, you know, their negotiations with Burnham are largely most evaluated by the attempt to improve their position with respect to their reinsurers and so that there's -- there seems to be a very high probability that a lot of those communications, if not most of them, are going to be protected by work product.

MR. FINNEGAN: Then, candidly, I think I would like that privilege log so I can put it before the jury and tell them that ever since they commenced this lawsuit, they have been working actively to try to hoist liability onto my client. But, you know, your Honor, I can demonstrate the fallacy in your thinking on this very easily.

On December 24th, 2013, Utica commenced another lawsuit against reinsureds. This time against Munich Re and Trans-Atlantic. That lawsuit proceeded to -- the claim against R&Q by 14 or 15 months. They did not take the position that when producing documents to us, that any of the documents created after filing their claim against Munich and Trans-Atlantic on Burnham that everything thereafter was work product. No. They produced the log, documents from 2014 and early 2015 that dealt with internal Resolute communication, that

dealt with communications between Resolute and -- and Utica.

So, that alone establishes that they all know full well that not everything that gets created after the filing of the complaint, whether it's against R&Q or against some other party is -- is privileged or work product and I would agree with Your Honor that the parties have taken a very sensible position that communications that relate to the lawsuit are certainly privileged but here there's two separate tracks. They're pursuing reinsurers on the one hand and on a separate hand, they're trying to resolve a coverage issue with Burnham. I certainly need to know what it is and what's driving their thought processes with respect to resolving issues with Burnham and if they want to put on the log that every single document relates to -- somehow relates to reinsureds, that's great for me because I think that would just prove my point is that what they're doing isn't acting reasonably and in good faith.

What they're trying, then, to do is to shift the liabilities onto the reinsurers and I would point out, you know, the few documents that we have gotten in this supplemental production that I have had a chance to get through -- and bear in mind, we had 130,000 pages so

I'm just -- you know, scratching the tip of the iceberg but there's a February letter from the folks at Resolute to Burnham and they say, oh, by the way, you owe us $20 million, and what I like to know, how did they calculate that $20 million? As far as I know, nobody was tracking all these shares. So there has to be some sort of internal communication that deal with what we're going to -- what component we are going to try to recover from Burnham and that's the type of information that's only available internally and then I can't get a complete picture without seeing that.

Another thing, as I mentioned earlier, I can demonstrate, based on the existence of the documents I have, that there was an internal term sheet modified before they shared it with Burnham. Again, I'd like to know why it is that they modified it and, again, there must be something internal and if there's any -- if there's any internal documents that I still need to see, in November 2016 Brooklyn -- somebody at Resolute wrote to John Roda, the general counsel at Burnham and said, I got your call and followed up with Dan. I believe she's referring to Dan Caswell, who is a coverage person then -- the Resolute organization. He is still putting final touches on his draft and I believe she's referring to the draft settlement agreement, negotiating at that

point and seeking approval. They should be able to turn out in a couple of weeks. Well, if folks within Resolute were deciding what should we provide to Burnham, I certainly need to see that. How am I going to be able to evaluate the Bonafetti (phonetic) and the reasonableness of their settlement discussion if I don't know what their motivations were and that's the exact type of -- of discovery that a District Court in Connecticut in Excalibur said is very appropriate, and just because this case dealt with work product and that was mentioned, I want to --

THE COURT: You're breaking up there. So --

MR. FINNEGAN: I went back and I reread Hickman and one of the things the Court said there was that the purpose of discovery is to provide parties with access, quote, to the fullest possible knowledge of the issues and facts prior to trial. Now, unless I get insight and I get access to the internal communications, I'm left with a very stilted and jaundiced picture and, as I said from the outset, it can't be possible that every single one of them is subject to either attorney-client or attorney work product privilege.

And I understand that the word attorney, I'm usually not using work product but as the Court will recall, there were multiple types of work product.

There's attorney work product which forms the impression and there's also work product that goes to the underlying facts and here I'm trying to establish the underlying facts. Who said what? Whom? Why did Resolute decide to use -- put these terms out to market? What were their fallback positions? And to the extent that there's any improper motivation, I'm entitled to find that out.

THE COURT: Mr. Finnegan, this -- the supplemental production that you have gotten includes, supposedly, the communications between Burnham and Utica in connection with this renegotiation or between Resolutes and Burnham?

MR. FINNEGAN: Right. As of the point in time, correct, because I believe those negotiations are ongoing.

THE COURT: And you really haven't had a chance to digest all of those?

MR. FINNEGAN: We're in the process of going through it. I mean, we -- we got it a week ago and, I mean, we're good but we're not -- you know, to figure out what the -- the salient provisions of 130,000 pages are in a week is -- is tough, even for us.

THE COURT: Okay. All right. Is there anything else you want to say?

MR. FINNEGAN: I think I've had the opportunity to say my peace.

THE COURT: Okay. Mr. Lee or whoever is speaking for Utica.

MR. LEE: Yes. This is Chris Lee from Simpson.

Mr. Finnegan mentioned a few different things; I'll try to address some of them. Just to back up a little, as best we can tell, the only document issue really in dispute is the single category of documents and that's -- the documents that R&Q describes as documents about the internal evaluation of coverage issues. Now, as you and Mr. Finnegan have pointed out, we have already made a very sizable production, just this past week, that includes many thousands of documents and that includes every document and email that went out the door from Utica or Resolute to Burnham, or vice versa. If we came across that document, we -- we agreed to produce it.

So that means we produced all the back-and-forth email exchanges between Utica and Burnham about the various coverage issues. It also means that we have produced all the draft term sheets and settlement agreements that have been exchanged between Utica and Burnham over the past year or so at a last

track, we have seen from December and R&Q now has that in their production.

So, when it comes to dispute, the documents about internal coverage analysis, we think that request should be denied for a couple of reasons. First, as I mentioned, we produced every single communication we're aware of between Utica and Burnham about coverage issues. So those -- so those documents include several iterations of settlement agreements and term sheets between Utica and Burnham. Now, if Utica conducted any what R&Q describes as internal evaluations, the end result of that analysis is going to be captured in what was sent out the door to Burnham and we have already produced that universe of documents. So Mr. Finnegan describes he wants to know what terms Resolute or Utica are going to subject to Burnham. Well, those are captured in the term sheets and settlement agreements that went out the door.

He talks about trying to figure out what Utica's trying to recover from Burnham, if anything. Well, that's going to be captured in what went out the door to Burnham.

THE COURT: Mr. Lee, let me interject. You know, that's certainly true to some extent but to the extent that Utica's being guided in its -- in its

negotiations with Burnham about the reinsurance implication, I think Mr. Finnegan is arguing that he's entitled to have an understanding of some of the motivation behind the negotiations that are taking place which might not be reflected in your communications with Burnham.

MR. LEE: To that point, your Honor, Mr. Finnegan mentioned Mr. Caswell and he is a coverage person, from what we understand, the coverage point person, the Burnham account from Resolute. R&Q is going to get a chance to depose Mr. Caswell in just a few weeks once we get through those documents and so, to the extent that they want to delve into motivation and what have you, they're going to have a chance to depose him about those motivations and they can reference the many documents that we have produced about a potential settlement between Utica and Burnham.

THE COURT: All right. Well, tell me -- let's talk a little bit about the extent -- I mean, I used the last time we met about the possibility work product privilege issues. I mean, I -- do you expect that you would be claiming work product or attorney-client privilege with respect to some -- any, all, most of the internal documents that are related to the negotiations with Burnham?

MR. LEE: Yeah. The short answer is yes. These documents are clearly from March 2015 and forward and that's when this complaint was filed. So any documents, any internal documents about coverage issues, that's necessarily going to impact the reinsurance litigation that we're in.

THE COURT: Okay. All right.

MR. FINNEGAN: May I have an opportunity to respond?

THE COURT: Let me just see if Mr. Lee is finished because I interrupted.

MR. LEE: I am, and I'm still on the line.

THE COURT: Okay. Mr. Finnegan?

MR. FINNEGAN: A couple of things. The mere fact that it may impact the litigation is not the test. The test is whether or not the documents were created for the purpose of a litigation. Here, the documents we're asking to see were created for the purpose, allegedly, of resolving a coverage controversy with Burnham. If that was their principal purpose for the creation of them, they can't possibly be subject to anything to withhold from R&Q and you know and I -- and I say this guardedly because I don't like throwing stones at people. But you know that their invocation of privilege is protect fraud because Mr. Lee just told you

that during depositions, he will allow me to delve into the motivations of Mr. Caswell and others.

Well, if I'm allowed to delve into their motivation in depositions, to be able to do that effectively, I need the documents. But the mere fact that I'm allowed to do it in depositions tells you that there's not a genuine privilege that would shield their underlying documents and -- and to -- you know, he began his entire spiel by saying, well, the end result is captured in -- in the -- in the documents. Well, if I told you that the end result of the Rangers game was three to two, you would know what the end was but you would have no idea whether it was a good game, whether it was a tight game. You would have no idea whether -- you have no idea about the day-to-day or the minute-to-minute happenings in that game and that's what's important.

When you go to analyze something, it's not what the final score is, you know whether it goes under the win or loss column but when you try to assess whether something is a good game or not, you need to know all of the track record.

THE COURT: Well, Mr. Finnegan, again, I'm having a little trouble with your analysis about work product and I was a criminal litigator for most of

my life, so I don't always have all this nuances of this but somebody testifying, how much does the work product privilege come up with respect to what's in their mind as opposed to whether a document was influenced by the ongoing litigation?

It seems to me to say that they're going to allow him to testify about certain things independent of documentation in the case that a claim of work product privilege with respect to certain documents would necessarily be privileged.

MR. FINNEGAN: Well, I go back to my initial premise, which is, there's two facts here. There's a reinsurance litigation and certain materials prepared in anticipation or -- or used in that litigation would arguably be subject to privilege or subject to work product. But where materials are being prepared in connection with the underlying litigation before the underlying coverage dispute between Burnham and Utica, it can't possibly, they have already raised that privilege and -- and I'm -- I'm stymied to try to come up with another way to express myself but I'll go back to what I said earlier.

They commenced the earlier litigation against Munich Re and against Trans-Atlantic. Nobody's took the position that every document created thereafter was work

product. They allowed me to see documents created from 2014. Would they be entitled now to say to Munich Re, having produced documents to me from 2014, oh, everything created after December 23rd -- December 24th, 2013, when we sued you, is work product. They are putting an artificial importance on when they commenced the litigation.

What if they commence the litigation, for example, against All-State next week? Is everything prior to now fair game for All-State to get into discovery because of a lawsuit wasn't against them?

THE COURT: Hang on -- hang on just a second. We heard another beep. So let's make sure we haven't lost anybody. Mr. Lee, are you still online?

MR. LEE: I still am, your Honor.

THE COURT: All right.

MR. FINNEGAN: And candidly, the rule that the Court is contemplating gives way too much ability to put cutoff discovery. What it means is, let us go far enough down the road with negotiations with our underlying insured and then we will start a lawsuit and then we don't have to produce anything more. I mean, I -- that can't possibly be the rule.

THE COURT: Okay. But here's the problem because, I mean, I've done privilege reviews in others

of these cases, right? And so there would be -- there would be documents discussing coverage issues between Utica and their insurers under either the primary policies or the umbrella policies and then there might be some -- some remark in these internal documents about how this might impact their reinsurance recoveries and Utica invoked the privilege and that's the stuff that the other side wants the most because it reflects the way that their negotiations with the insured -- the underlying insured is influenced by their desires to increase their reinsurance recovery but that's -- that's the line they have drawn in terms of what they have waived and what they haven't waived.

MR. FINNEGAN: I get that and that's precisely why I'm saying I believe in the appropriate response here is to order them to produce the internal communications. Insofar as one or more of them are subject to privilege, they can either redact the line that you just mentioned, for example, how it might impact reinsurance and give me access to the remainder of the documents. I don't think it's as herculean task as they're suggesting it is.

We have gone through document production in this cases and in Goulds and Your Honor is right. There have been privilege rights, I don't think any of those

privilege fights have been from us. I think what we have done is we have discussed invocations of privilege with our adversaries and we have come to agreement. Certainly I know for fact that we put things in our log that when they were challenged, we gave and -- and I believe that's in the case with Utica as well.

The mere fact that there have been instances in the past where parties have come to this Court and asked for relief doesn't say that they're not entitled to get underlying documents to begin with and that's -- that's the antiquated question. They won't even give me a privilege log and, candidly, if this Court doesn't first direct them to produce the internal evaluation --

THE COURT: Well, I get that. I haven't -- I haven't seen a privilege log yet that hasn't enlightened anybody, including me, but the bigger point is, you know, what we're saying, essentially, is that to the extent there are documents reflecting how Resolute's ongoing negotiations with Burnham are really directed at trying to maximize their reinsurance recoveries, you're not going to get that because it's work product privilege.

To the extent their negotiations with Burnham have nothing to do with the reinsurance, you're going to get them but they're not going to be used. So why do we

go through this entire exercise and put me through yet another round of privilege -- privilege litigation if -- if where the line is drawn is -- happens to coincide with what's going to be useful or -- and interesting to you and what isn't?

MR. FINNEGAN: I think you just said that the documents won't be useful or interesting to me. I don't know that until I see them. I don't know until I find out what miss -- for example, Brooke Green and Dan Caswell discussed relative to what their negotiating positions would be with Burnham. I don't know whether it's going to be useful. I can tell you, having seen a lot of these internal Utica documents, that there are a number of documents that are useful and interesting to me and that will certainly feature prominently in any motion practice or in any trial of this case.

And, you know, you're putting me to an impossible burden of telling you what's the substance of these documents without first having seen them and I can't do that. But obviously if -- if I can establish right now, for example, that they took a paragraph out of a draft term sheet before they disclosed to Burnham, it would be interesting to me to find out what it is that they took out and, more importantly, why it is that they thought it was important to take it out.

THE COURT: But if they thought it was important because of the reinsurance implication, then it seems to me it's going to be privileged. If they didn't --

MR. FINNEGAN: Then I won't get it. So --

THE COURT: So, Mr. Lee, why can't you -- why can't you go through these documents and do a privilege log like you would do on pre-complaint documents?

MR. LEE: Well, thank you, your Honor. You know, we obviously disagree with some of the -- or many of the points that Mr. Finnegan raises. You know, I guess it's just -- as Your Honor -- as Your Honor we think is suggesting, it's very unconventional and in a post-litigation context to require parties to log communications that obviously touch on the issues that are at the heart of the dispute and so, you know, I think we could get -- I think Mr. Finnegan is suggesting that these bodies of water are very distinct but I think in the end, the issues that are -- that are -- invoke the privilege are inextricably or intertwined with and embedded with all of the documents.

So I think we just think given these circumstances in the post-litigation context, it doesn't make sense.

THE COURT: Okay. I'm going to start with a

little discussion of the work product privilege I think is really the key issue here because, as Mr. Finnegan has pointed out, he's recognizing that communications involving counsel would -- are not the focus of what he's looking for.

In order for a party to assert privilege under the attorney work product doctrine, they must be able to show that the documents were prepared in anticipation of litigation by a party or its representative not in the ordinary course of business. Carpenter v Churchville Green Homeowners Association is a Western District of New York case from September 29, 2011, that makes its point, it's recorded at 2011 Westlaw 4711961 at page 8.

Also relevant to that point is Rule 26(b)(3) of the Federal Rules of Civil Procedure in U.S. v Construction Product Research, Inc., 73 F.3d 464 and 473, Second Circuit from 1996. A document created for both a business purpose and litigation may be protected under the work product doctrine even if the litigation is not the primary purpose, and I'm quoting now, as long as the document would not have been prepared in substantially similar form if not for the prospect of litigation. That's a quote from in re Veeco Instruments, Inc., securities litigation, Southern District of New York case from March 9th, 2007, reported

at 2007 Westlaw 724555 at page 5, in turn cites the Second Circuit case of United States versus Adlman, 134 F.3d 1194 to 1195, in 1998 Second Circuit case.

As I recognize, during the February 14th discovery conference, docket number 108 at page 87, any post-complaint internal communication about Utica's negotiations with Burnham would, in all likelihood, be protected at least by the work product privilege to the extent it was relevant to the reinsurance implication of those negotiations.

As I suggesting earlier, it's difficult to concede that Utica or Resolute would generate internal documents about negotiations with Burnham after this action was filed that would not, in a significant way, be affected by the pendency of this reinsurance litigation.

To the best of my recollection, the parties in the various Utica Mutual cases I have handled over the years have not sought, nor have I required, a Utica log or produce post-complaint internal documents relating to coverage matters that would clearly impact the reinsurance issues that were being litigated.

I recognize that the situation in the Century case where I denied any discovery with respect to post-complaint negotiations between Utica and Goulds

Pump is very different than this case because Utica-Burnham settlement would likely have a substantial impact on R&Q's potential future obligations to Utica. That is why I advised the parties in February that I thought discovery regarding even post-complaint communications between Utica and Burnham regarding the settlement discussions would be fair game for discovery. But the impact of a potential settlement on R&Q's exposure in this case doesn't change the privilege issue with respect to post-complaint internal Utica-Resolute documents regarding settlement negotiations or related coverage issues.

Given the likelihood that any material and relevant post-complaint documents requested by R&Q would be protected by the work product privilege, it is not, in my view, proportional to the needs of the case at this stage of the proceedings to require Utica to generate a privilege log for those documents, and for me to get enmeshed in more discovery in privilege litigation.

As I stated earlier, you know, it is certainly conceivable that there are aspects of negotiations between Utica and Burnham that don't have a significant impact on the reinsurance issues and that might not be influenced by the litigation and might not be protected

by the work product privilege, but it seems to me that those documents would essentially not be of great relevance and under the principles of proportionality to require Utica to go through the unusual step of logging all these post-complaint documents I think would be, again, not proportional to the needs of the case and burdensome.

So I'm going to deny R&Q's motion to compel further responses regarding Utica's internal post-complaint documents relating to the negotiations with Burnham. Now, I am not ruling out limited reconsideration of this issue, depending on what Utica produces with respect to its direct communications with Burnham or depending on the ultimate resolution of the ongoing settlement discussions and I recognize that Mr. Finnegan has drafts, only scratched the surface of the voluminous documents that have been produced and we don't have the benefit of, you know, his deep analysis of those documents as it might impact on this. But, for now, I think it would be unduly burdensome for both Utica and the Court and not proportional to require further responses with respect to the internal documents.

And the other thing that may impact my thinking on this might be the depositions of some of the

key players here and, you know, I think it is worth exploring whether the depositions of people like this -- Mr. Caswell would allow some discussion of the motivational issues and that sort of thing that might be useful to R&Q and so, you know, after all of those, I'm not ruling out reconsideration but I just think at this stage, it's late -- relatively late in the pretrial proceedings, given the likelihood of the frequency of work product privilege applying and the lack of relevance of the documents to which it would apply. I'm not going to order Utica to respond further or to log all those documents.

Okay. Now, turning to the applicable -- the request for admissions, I'm going to start with some law relating to requests for admissions. U.S. District Judge Kimba Wood provided a concise decision of the general standards for evaluating the appropriateness of requesting for admissions and the sufficiency of responses in Rule 36 of the Federal Rules of Civil Procedure in Wiwa v Royal Dutch Petroleum Company, Southern District of New York case from May 26, 2009, cited at 2009 Westlaw 1457142 at page 4 to 5 and I'm going to read a lengthy quote here:

"Requests for admissions are not a discovery device. The purpose of Rule 36 is to reduce trial time

by facilitating proof with respect to issues that cannot be eliminated from the case and narrowing the issues by eliminating those that can't be. Requests should be simple and direct, not vague or ambiguous, and should state the facts in such a way that it can be denied or admitted with an absolute minimum with an explanation or qualification. A denial must be stated specifically and must respond to the substance of the matter. However, responding party may, in good faith, qualify its answer or deny only part of a matter. Qualification of a denial is appropriate if the statements in the request, although containing some truth, standing alone out of context of the whole truth conveys unwarranted unfair references." I swear they must mean "inferences" but they use the word "references".

Continuing the quote: "Qualifying a response that may be particularly appropriate if the request is sweeping, multi-part, involves sharply contested issues or goes to the heart of a defendant's liability. Any qualifications should provide clarity and lucidity to the genuineness of the issue and not obfuscate, frustrate or compound the references. However, a response should be deemed sufficient if it reasonably informs the requesting party what is being admitted or denied.

The requesting party can challenge the sufficiency of its adversary's responses. When assessing the sufficiency of a party's responses, a Court considers whether the response meets the substance of the request and whether any qualifications are demanded by and made in good faith. If a Court finds a response insufficient, the Court may order either that the matter is admitted or that an amended answer be served. Deeming a matter admitted is a severe sanction.

"Furthermore, a motion to determine the sufficiency of a response is not to be used as an attempt to litigate the accuracy of a response." That's the end of the quote.

Former Magistrate Judge Treece articulated a few other important aspects of the standards of Rule 36 in the cases of Henry versus Champlain Enterprises, Inc., a Northern District of New York 2003, reported at 212 F.R.D. 73 at page 78. Again, that's a fairly lengthy quote. "The party is permitted to object to the request for a particular aspect of the request. This requires the responding party to set forth in detail the reasons why the answering party cannot truthfully admit or deny the matter.

"If the objection is only to a portion of the request, the responding party is required to

unambiguously answer that portion of the request to which the objection does not apply. Furthermore, these objections must be directed and specifically related to a specific request. General objections without any reference to a specific request to admit are meritless.

"To the extent that the answering party is incapable of providing a response with the information reasonably available to it, Rule 36 requires a responding party to make a reasonable inquiry, a reasonable effort to secure the information that is readily obtainable from persons and documents within the responding parties' relative control and to state fully those efforts. Such reasonable inquiry includes an investigation and inquiry of employees, agents and others who conceivably, but in realistic terms, may have information which may lead or furnish the necessary and appropriate response. The inquiry may require venturing beyond the parties to the litigation and include, under certain limited circumstances, non-parties but certainly not strangers." That's the end of the quote and with both of these long quotes, I have deleted a lot of citation and made no effort to get into internal quotations.

A few other points regarding the legal standards for request for admissions. The standards for

relevance for request for admissions are as broad as the standards for federal discovery generally. That's established by, among other cases, Booth Oil Site Administrative Group versus Safety-Kleen Corporation, Western District of New York case from 2000, 194 F.R.D. 76 and 79, which held, and I'm quoting, "A request to admit coverage of the full range of information discoverable under Federal Rule of Civil Procedure 26(b), including matters of facts as well as the application of the law to the facts."

Secondly, another principle related to Rule 26, and I'm quoting from another case: "It is well established that possession of information by the requesting party is irrelevant to the propriety of request to admit that purpose of which is not to discover information but to narrow issues for trial." That's Al-Jundi versus Rockefeller, Western District of New York case from 1981, cited at 91 F.R.D. 590 at 594.

Now, I'm going to start by addressing a few general issues relating to the proportionality of R&Q's request and the accuracy of Utica's responses and then I will dive into the thicket of individual requests.

I'll start by noting that R&Q's brief specifically discussed all but about a hundred of its 256 requests for admission. In footnote 2 of the brief,

R&Q then states that it will also have specifically addressed the other 100 or so requests were it not for the 25-page limit imposed by the Court onto the memorandum of law supporting the motion.

R&Q then asked that the Court direct Utica to apply the Court's guidance with respect to the other requests and modify its responses to those other requests accordingly. It is not unreasonable for the Courts to apply page limits to non-dispositive motions, even if the result is the parties are then required to prioritize the issues on which they seek relief from the Court. I would note that even though I have placed much more stringent page limits on discovery motions in other Utica Mutual cases, with respect to this motion, I use the 25-page limit established by our local rules.

R&Q did not request an extension of that page limit, although it used every bit of 25 pages in their brief. The federal rules do not place emphasis on the number of requests for admissions that a party may propound. However, even in a case as complicated as this one, 256 requests for admissions seem excessive and unduly burdensome. R&Q's requests are often duplicative and overlapping. However, that's probably reflected, in part, R&Q's largely correct anticipation that Utica would strain to avoid making definitive admissions in a

variety of areas that would not seem to be open to genuine dispute.

Based on consideration of proportionality, I am only going to consider and rule on the 150 or so requests for admissions that R&Q's specifically addressed in its brief and will not order Utica to respond to the other 100 or so that were only mentioned in footnote 2. I would note that R&Q did specifically discuss in its brief generally and other footnotes a handful of the numbered requests that were not discussed in the text. I will address that handful of requests notwithstanding the fact that they were also listed in the catchall footnote of footnote 2.

But to be clear, unless I make a specific ruling with respect to a particular request during the conference today, R&Q's motion to compel a further response to other requests is denied.

Now, I think that R&Q correctly argues, based on, inter alia, the Henry case, 212 F.R.D. 78, that general objections are not appropriate in the context of requests for admissions. So I'm going to consider only the skill fulsome objections and responses that Utica makes specifically to each request for admission. I will ignore Utica's attempt to incorporate by reference its general objections.

R&Q also raises a general argument that Utica unreasonably objected to more than 175 terms or phrases which are listed in Exhibit 6 of R&Q's papers, docket number 109-8. That is in -- the objections to these phrases are terms that were vague or ambiguous. R&Q requested that I strike these objections or, in the alternative, order Utica to respond based on definitions found in R&Q's request or in Webster's Collegiate Dictionary; that's reflected in R&Q's brief at pages 7 to 8.

It is clear that Utica's objections based on vagueness and ambiguity were often evasive and arguably abusive. However, Utica typically did not rely exclusively on that objection and often provided qualified responses notwithstanding objections to certain terms and phrases and I don't frankly think that a resort to a dictionary definition is particularly helpful since Webster's often has alternative definitions for many words.

I think it is best to defer consideration of whether certain words or phrases are vague or ambiguous to my consideration of the particular requests because generally that decision is best made in its specific context.

I'm also going to defer to my consideration of

particular requests R&Q's argument that Utica improperly objected to many requests by stating that the requests relied on a false premise. As Utica points out, I have previously stated in Century Indemnity case, docket number 6:13-cv-995 that the proponent of a request for admission is not -- I'm quoting myself now -- "entitled to precisely the answer it prefers". That's from the hearing transcript on September 9th, 2014, in the Century Indemnity case at page 11, docket number 93, again, case number 13-cv-995. Moreover, as established by the Wiwa case that I quoted earlier, I can't give into an assessment of the accuracy of a response for admission in evaluating its insufficiency. However, there are definitely instances where Utica has improperly evaded making a fair response to certain R&Q's requests using the false premise objections. I will address those specifically but not as a general matter.

Utica has raised one particular objection in connection with a number of requests that I can address, in part, in general terms. Utica suggests that it should not be required to respond to a request for admission that involves a disputed issue that is central to the litigation. That's Utica's brief at pages 7 to 8 makes that argument.

Cases cited by R&Q, some of which I've discussed already, indicate -- I'm sorry. Cases cited by Utica, some of which I've discussed already, indicate that it may be appropriate for a party to deny in good faith or to provide a qualified answer to a request which deals with a key disputed issue in the case. See, for example, Burns versus Bank of America, a Southern District of New York case from June 4th, 2007, reported at 2007 Westlaw 1589437 at page 10, which held, and I quote, "Where issues in dispute that go to the heart of many of plaintiffs' claims are requested to be admitted, a denial is a perfectly reasonable response," closed quote. However, I agree with cases from this Circuit that have held that, and I'm quoting now, "the fact that an admission provided in response to a request made prove decisive to the case is no grounds for a refusal to respond," closed quote. That's a quote from the Booth Oil case, 194 F.R.D. at page 80.

So I'm now going to address the specific requests for categories of requests roughly in the order presented in the R&Q's brief and I am going to, time to time, ask you questions and give you a chance to make supplemental arguments. I'm going to do in the context of specific requests or categories requests.

I'm going to -- about a 30-second break and

get water and have a drink before I resume. So hang on just a minute.

(Pause in proceeding)

MR. LEE: Thank you.

THE COURT: Okay.

MR. FINNEGAN: Would it be possible to ask for a three-minute break?

THE COURT: Absolutely. We will break for three.

MR. FINNEGAN: Thank you.

(Pause in proceeding)

MR. LEE: Thank you. Your Honor, could you just give us another minute?

THE COURT: Yes, that's fine. Missy is not back in the room anyway.

MR. LEE: Okay. We will chime in when we're all already but it should be just a minute.

(Pause in proceeding, 2:11 P.M.)

(Following recess 2:13 P.M.)

MR. LEE: Your Honor, this is Chris from Simpson, we are ready on our end if --

THE COURT: Okay.

MR. FINNEGAN: We are as well.

THE COURT: Okay. So while I have had significant involvement in monitoring the discovery

proceeding in this and other Utica Mutual cases, I obviously do not have the level of familiarity that the lawyers have with respect to complicated background of this particular litigation, the common parlance and terminology used in the reinsurance deal than the gory details of your prolonged discovery battles. As a result, it does not make a heck of a lot of sense to me that the parties would prefer that I take on the task of reformulating requests for admission and responses rather than having the lawyers conduct a reasonable and rational negotiations to resolve those difference but I guess this is the new phrase be careful what you wish for because I'm going to try to resolve your major disagreements.

In the interest of efficiency, I'm going to attempt, to the extent possible, to be very specific about the deficiencies in the requests for the responses as opposed to providing general guidance and allowing the parties to fight over another round of reformulating requests to responses. So, while I won't be able to do that in every case, I'm going to try to minimize the chance that we are going to be doing this again in a month or so.

So the first group of requests relate to Utica's alleged failure to disclose, and I'm quoting

now, complete copies of primary policies and corresponding underwriting files, in particular, requests number one through eight, 11 through 18, 19, 21 through 28 and 29. So I'm going to start with request 1 through 8 which state, and I'm quoting: "Utica has been unable to locate a complete copy of the primary policy that Utica issued to Burnham effective for all or any part of the period and, there again, a series of questions that covers a period January 1, '76, to January 1, '84, or the '76 to 1983 primary policy."

Utica's response is: After invoking the general objections, which I'm not considering, Utica admits that after conducting a reasonable search, it has not been able to confirm that it has located all of the pages of the primary policies that Utica issued to Burnham effective for all or any part of that -- of the period," closed quote.

Now, I find that Utica went one step too far in hedging its responses by adding the clause that it couldn't confirm that it had located all the pages of the primary policies. There does not seem to be any genuine dispute that Utica was not able to find all the pages of some or all of the policies and it must so admit. While the term "complete copy" seems relatively clear notwithstanding Utica's suggestion in other

responses that it was vague and ambiguous, Utica's alternative articulation, in terms of missing pages, is adequate. So, essentially, I'm going to direct that -- Utica to provide the following response: Utica admitted that, after conducting a reasonable search, it has not been able to locate all pages of the primary policies that Utica issued to Burnham effective for all of any part of that period." And, you know, to the extent that is not true with respect to particular years, fine, but that's the language I'm going to be looking for.

And I'm going to say this up front. I'm also going to say it at the end. I usually try, at the end of these long discovery conferences, to do a summary order which summarizes the particular rulings that I have made. In this case, since I'm dealing with 150 or so requests for admissions, I'm not going to do that. So, I'm going to basically direct you to the transcript of this proceeding for my rulings with respect to these individual requests for admissions, so what that means, I think, is to the extent I say something that you think requires clarification or is unclear in some way, I would suggest that you interject and we get it cleared up on the record because I'm not going to have my usual opportunity to clear things up in my summary order.

All right. So, the next request in this group

is number 9. R&Q seeks similar admissions with respect to the Utica-Burnham primary policies for the prior period January 1, 1972, and not 1970, which was stated in some of the requests but R&Q's brief makes clear it was a typo. So the period from January 1, '72, to January 1, '76, or '72 through '75 primary policies. Utica raises a host of objections including relevance. So I have -- I have some -- a couple of questions here.

Starting with you, Mr. Finnegan, did R&Q make document demands for the primary policies from the earlier period or related written related discovery demand?

MR. FINNEGAN: Actually Ms. Gold was going to handle this but -- but since she's looking at me quizzically, the answer is, I believe we made document requests for it but we ended up compromising in discussions and only took '76 and later, which is to say that the period prior to '76 isn't relevant because, as we pointed out, for a -- you know, 12- or 13-year period beginning January 1st, 1972, through December 31st, 1983, the underlying primary policies lack aggregate limits.

THE COURT: Okay. So you made those demands but in negotiations, then, you agree to accept only the primary policies in the years that you had

reinsurance or R&Q had reinsurance?

MR. FINNEGAN: That's correct.

THE COURT: Fine, and is there other prior discovery other than the document production that makes clear that Utica was not able to find complete versions of the earlier primary policies? Depositions or whatever?

MR. FINNEGAN: There are certainly documents, internal Utica documents including, I believe the earliest of which is August 8th, 1987, created by Dane Austin and one of his bosses at the time that talks about it. There are still later memoranda created by claims folks and there is a chart which I believe is dated August 15th of 1985 that lists, you know, all the policies and indicates which ones they had information pertaining to and which ones they lacked information.

THE COURT: So Mr. Lee or Ms. Alcabes, whoever is speaking on this issue, how is Utica burdened in addressing this request given that it apparently had to try to reconstruct the earlier primary policies back in the -- in the '80s?

MS. ALCABES: Your Honor, this is Elisa Alcabes. You know, I think the issue herein so far as R&Q admitted I guess that they have withdrawn their -- their request for production of those earlier policies.

We are of the position that they're not relevant, and it's just a little bit of a slippery slope, I guess, in terms of why do we need policies that are not at issue involved here. We don't think that it forms the -- the process in any way. And so, you know, to -- we don't understand why they need this, we don't understand how it streamlines the trial which we understand to be the purpose of Rule 36. I mean, we have that kind of overarching issue with a lot of these requests. We just -- they don't seem to be geared towards making any anything easier to deal with at trial.

THE COURT: All right. But your main issue is relevance and not burden.

MS. ALCABES: Yes.

THE COURT: Okay. Well, I guess I do see the relevance argument that R&Q makes here by the broad standards of relevance applying to federal discovery rules, the contents of the earlier Utica-Burnham policies are sufficiently relevant. The time period over which these policies were found incomplete, particularly with respect to explicitly stated products aggregate limits is relevant to R&Q's effort to rebut Utica's position that these policies were complete and did include specific limits.

It is difficult to imagine that Utica did not

need to -- it is apparent from what Mr. Finnegan said, actually, that Utica did try to reconstruct the '72 to '75 policies in connection with Burnham's claim. So the burden of investigations to respond is not substantial.

So, you know, to the extent you're arguing relevance here, I think the fact that there's a longer period of time during which Utica is not able to reconstruct the complete policies and there are some key blanks that were not filled in with respect to products aggregate limits is relevant under the broad standards. So, I'm going to order response to number 9 and, again, would note that while the phrase "complete copy" does not seem vague or ambiguous in the context of insurance policies, Utica can use the pages phrasing it used in response to numbers 1 through 8.

MS. ALCABES: We understand and I imagine that was probably resolved from the other objections to that other time period.

THE COURT: Okay. Now I'm going to take request number 21 to 29 out of order for reasons that I think will be clear in a minute. Number -- bear with me here. Number 21 through 29 reads: That Utica has been unable to locate any portion of the underwriting files other than, perhaps, than pages of policy documents, copies of which have been produced in this litigation

for primary policy that Utica issued to Burnham effective for all or any part of the period January 1, '76, to January 1, 1984.

Utica responds: Utica admits that it has produced certain documents relating to underwriting of one or more of the primary policies and that it has not produced documents that it has not located, that was quoted. Number 29 makes essentially the same request with respect to the '72 to '75 primary policies and Utica provides essentially the same request.

So I guess my first question: Is there a genuine dispute as to whether Utica was able to locate and produce any underwriting documents for these primary policies?

MS. ALCABES: My understanding is that we have produced underwriting documents. So, you know, how do we answer this question? We could deny that we are unable to locate any portion of the underwriting file or we could admit that we located and produced it. This doesn't seem to be a genuine -- it doesn't seem to be a genuine dispute. Either we found the underwriting file, underwriting documents and we produced them or whatever we couldn't find, we didn't produce.

I mean, there's no reason that there are issues concerning the ability to locate policies and

underwriting -- I think, you know, from the -- the way that this request is phrased, it's asking whether we are unable to find any underwriting documents. I mean, we have found underwriting documents. We produced underwriting documents. To make a representation about something that we can't find, you know, how do we do that? Do we deny it and then they come back and say how can you deny it? Or do we admit that we produced underwriting documents. So we certainly would -- would welcome the Court's guidance on this but we feel like we have answered this question.

THE COURT: Okay. So I -- I think the response, under the circumstances, should be reframed as follows or something similar: Utica admitted that it has produced all of the documents related to the underwriting of one or more of the primary policies that it was able to locate after reasonable search. I mean, wasn't clear to me is that if you are saying you produced some but perhaps not all, I think perhaps that's a less -- a more clear way of saying Utica admits it has produced all documents relating to the underwriting or more one or more of the primary policies that it was able to locate after a reasonable search. Not saying you can't tinker with that but I think that's perhaps phrasing that it's less evasive than what you

had.

All right. Going back now to request 11 through 18, they seek an admission to the statement that, and I'm quoting, "Utica has been unable to locate a complete copy of the underwriting files from '76, '83 primary policies and number 19 seeking the same admission with respect to the '72 through the '75 policies. As to the '76 to '83 policies, and I'm quoting now, "Utica admits that after conducting a reasonable search, it has not been able to confirm that it has located all pages of all documents that may have been, at any point in time, been contained in the underwriting file for the primary policy that Utica issued to Burnham for all or for any part of the period to the extent such file existed.

So, again, Utica has represented that it has produced some but perhaps not all of its underwriting documents; is that right?

MS. ALCABES: Yes.

THE COURT: All right. And of what you have produced, are there pages of particular documents that appear to be missing or is the entire underwriting document that you might expect an insurance company to maintain that it's missing completely?

MS. ALCABES: Your Honor, respectfully, I'm

going to confer with Chris Lee about this because it -- he was handling it.

THE COURT: Okay.

MS. ALCABES: If you will bear with us for a moment.

(Pause in proceeding)

MS. ALCABES: Your Honor, I think the answer to this, again, it may answer the question as to other. I know you have -- are you able to hear me?

THE COURT: Yes.

MS. ALCABES: If we had a document from the underwriting file, we produced it. So, we were under the formulation that you proposed with respect to 21 through 28. To the extent that that gives us more clarity, we certainly understand.

THE COURT: Okay.

MR. FINNEGAN: May I chime in?

THE COURT: Sure. Go ahead, Mr. Finnegan.

MR. FINNEGAN: I'm not sure that gives it clarity because the point that we're trying to get across is that they no longer, by year, have complete files and while they may maintain the position that they produced a smattering of underwriting documents, if they have, I haven't seen them beyond pages of the policies. But insofar as they take that position, it's not going

to be true of all of the years in particular and that's why we have focused in and would want a specific request by year and it's, you know, helpful to me, candidly, to know whether they are going to take the position, for example, that they have produced the entire '77 underwriting files or the entire '78 underwriting file or any record relating to those years.

So if we get down into the weeds and they will tell me, yeah, we take the position that we produced documents relating to this, obviously their position is what it is and if I have to disprove it, so be it. But, I do think it's critically important not to just a wishy-washy response by year.

THE COURT: Okay. I mean, does Utica contend that it would not have maintained an underwriting file of some sort by year for each of its primary policies back in the '70 and '80s?

MS. ALCABES: I'm sorry. Your Honor, sitting here today, I can't answer that question. We -- we can try to find out the answer to that. To the extent we can provide more clarity by doing it on a year-by-year basis, we're not opposed to doing that. We just -- we don't have the answer right now.

THE COURT: Okay. And is there a -- was there a legal requirement under state law that you maintained

some sort of an underwriting file or is that just an issue of insurer practices?

MS. ALCABES: I am not aware of a legal requirement but, again, we would have to confer with our client and get -- and, you know, respond on that.

THE COURT: Okay.

MS. GOLD: This is Allison Gold on behalf of R&Q. I just wanted to point out that one of Utica's underwriters, Dane Austin, when he was deposed, talked about what would be in the underwriting file for the policies because he listed specific types of documents. So, it -- given that testimony, it seems like a pretty -- it should be pretty easy for there to be a straightforward response, the request for admission.

THE COURT: All right. So, I think where I come out, then, is that -- I'm going to require Utica to respond on a year-by-year basis, to the extent that requires some further reconstruction of what it's produced and what years it relates to and I think eliminate some of the hedging in its response by saying, in substance, Utica admits that after conducting a reasonable search, it has not been able to locate all documents that may have been contained in an underwriting file or the primary policy that issued to Burnham for all or part of that year. So it takes out a

few of the hedging statements and it focuses on a year-by-year basis.

With respect to number 19, you know, again, the relevance objection with respect to the underwriting file, while I think the relevance is probably a little more attenuated for the earlier years than for the policy documents, I'm going to require a similar response from earlier years.

Okay. I'm sure I've gotten everything in that group. All right. Bear with me here.

So let me just -- focusing on the earlier period here for a minute. Did R&Q make discovery requests with respect to the underwriting files for the earlier time period, the '72 to '75 primary policies?

MR. FINNEGAN: I would be shocked if I did not, your Honor, and I would believe that -- that just as we conceded in an effort to avoid discovery, in bringing things unnecessarily before the Court, we would have relinquished anything prior to '76 as we did with respect to the policy themselves.

THE COURT: All right. But, Ms. Gold, you referenced some deposition testimony from a representative that sort of talked about what one would have expected to find in the underwriting policies for this time period including the earlier years?

MS. GOLD: I believe Mr. Austin began working at Utica -- I think it was in 1979 but he did testify generally what the typical underwriting file would contain.

THE COURT: All right. And was there other discovery depositions or documents that you did get which indicate that the earlier -- for the earlier years, the underwriting files were also incomplete?

MS. GOLD: Your Honor, the -- the position that we understand Utica to have been taking all along is that --

MR. FINNEGAN: Can I just cut to the quick, your Honor? The same memos I discussed earlier, including Mr. Austin's August of 1985 memorandum talks about there being a gap in policy documentation between 1971 and sometime in the late 1970s. I believe the same is true of the memorandum that Joseph Sewell prepared. So -- and the short answer to your question is, yes, there are documents that indicate that the pre-1976 policy underwriting files cannot be located and/or are incomplete.

THE COURT: Okay. All right. So I'm going to stand by my ruling on relevance, that the earlier years are relevant by discovery standards even with respect to the underwriting files and it sounds as if, based on

this other discovery, that there wouldn't be an undue burden on Utica to respond to this one in similar fashion to what I've just stated for the '76 to '83 policies.

Okay. Any questions or clarifications before I move to the next batch?

MS. GOLD: Not on our end, your Honor. Thank you.

MS. ALCABES: Not on ours either, your Honor. Thank you.

THE COURT: The next group of depositions relate to requests regarding documents that Utica has obtained from Burnham and/or the broker Alexander & Alexander, which are various groups. The request between 30 and 65, and the parties seem to routinely refer to Alexander & Alexander as A&A so I will use that shorthand along the way.

This series of requests, in my view, highlights R&Q's use of repetitive, overlapping and poorly framed requests. I'm assuming that the gist of what R&Q would like to pin down Utica on appears to be whether Utica requested and/or received from either Burnham or from A&A documents making up the primary policies or the underwriting documents for those policies when Utica was apparently unable to locate

complete copies in its files.

It is debatable whether any of our R&Q's 36 requests for admissions on this subject really frame the issue clearly. None of the requests seem to ask whether Utica ever actually requested Burnham or A&A to search for and to provide either primary policies or underwriting documents relating to them.

It seems to me that Utica may reasonably lack knowledge of whether it may have requested such information back in the '70s or the '80s; however, whatever point before it came became clear that Utica faced substantial exposure to Burnham on these policies because of the explosion of asbestos claims. But it would seem that after some point, when Utica realized its exposure on these policies and discovered that its files relating to these policies may have been complete, don't know one way or another whether it requested or received any such documents from Burnham or from A&A.

So, with those general comments in mind, let me ask some questions. Did either side direct third-party document subpoenas to Burnham to or A&A looking for the missing primary policies documents or underwriting files?

MR. FINNEGAN: The answer is yes. We -- we served subpoenas both on Burnham and on A&A. With

respect to Burnham, we received a production and as far as I could tell, none of the materials -- Burnham, too, was incapable of producing complete copies of the policies that were most interesting to us. A&A basically told us we have gone through so many corporate changes and -- and reformulations that's currently part of A&A, that insofar as we had any documents, we can't even begin to figure out where to look for them. So it never went beyond.

In answer to -- to a question the Court impliedly asked a moment ago, there are many documents by which Utica wrote to Burnham asking for complete copies of policies and for underwriting information. There is at least some correspondence.

THE COURT: The timeframe of when that started --

MR. FINNEGAN: I know it started at least in -- in the early '90s, '93 or '94 when Mr. Sewell was handling the account and it continued for years to come, and you'll find in many of their internal memos and memos that they provided to reinsurers that they purport to have conducted, quote, an exhaustive search and all I'm -- you know, if they want to turn around now and say, well, we never asked A&A, which I think would be contrary to the record, that's fine. You know, but

having conducted an exhaustive search, you would think that among the various places they would have gone would be the broker and, as I said, there is some correspondence indicating that in 1990s Mr. Turi had gone to the broker and broker said, well, I can't do it unless Burnham gives us permission and Mr. Turi went to Burnham and said -- and I believe it was Berardi (phonetic) who was in charge of Burnham at that point in time and said can you please give permission? And nowadays nobody can remember what the answer was to that question but presumably they had their eye on where to go and if they didn't get documents, they can certainly tell me that but it's certainly -- based on the record as it now exists, I noted for fact and can establish that they did seek documents from both sources.

MS. ALCABES: Your Honor, I think you hit the nail on the head when you said --

THE COURT: This is Ms. Alcabes?

MS. ALCABES: Alcabes.

THE COURT: Sorry. I keep mispronouncing your name. I'm sorry.

MS. ALCABES: You hit the nail on the head. I find it a little bit troubling that the implication here is the -- somehow Utica has in its file policy documents that we haven't produced. We already produced all the

policy documents, underwriting documents we could find. The problem with this request for admissions is -- the problem is that it's asking -- they're asking for us to go back and reconstruct how it's found all the documents that are contained in its files. We can't -- candidly, cannot do that. These are documents that go back decades, and we have produced what we found and R&Q has gone out itself and asked third parties what they have and they have gotten. So, again, so I don't see how this is going to expand the log except for us to say we don't know where all of the documents contained in our files come from but we have produced everything that we could find.

THE COURT: Okay. And --

MR. FINNEGAN: Your Honor, can I just address something because they're twisting the issue. We're not suggesting and we have never suggested that since Simpson, Thacher is sitting on a cache of documents that for some reason they are withholding from us. I would never make an irresponsible assertion like that.

What we're just trying to button down is so that when we go to make motions, we can say not only can't Utica find its own documents, but Utica asked Burnham for documents and Burnham, too, couldn't give them the documents.

We would like to also be able to say that, you know, putting aside what Utica and Burnham could find, they went to A&A and A&A, too, can't find their documents and part of this is, I want to be able to contrast it, candidly, to what happened in the Goulds case, where they did go, eventually they got around to asking the broker for documents and, lo and behold, the broker had some good documents for Utica. They don't have any similar good documents in this case, they have got nothing and that's what I want to keep being able to establish is, they don't have here what they had in Goulds. Goulds they might have been able to come up with a colorful argument that aggregate limits were indemned, here they have nothing to establish that and every time they -- they double-talk and they are trying to get around saying, well, we don't really know what we had and we've done our best. I don't care what you've -- you know, what you -- one thing. What's -- what's important to me is today you don't have them and, therefore, today you can't establish certain propositions because you don't have your underwriting files. That's what's -- that's what's credibly important or critically important.

THE COURT: And what was the timing of the documents that you were suggesting indicates a

representation by Utica that they made an exhaustive search? Is that also back in the '90s?

MR. FINNEGAN: Those -- those begin in the '90s, and they continue at least as late as 2012. There may be additional documents that Resolute created once it began but I know that the last one that -- that Utica created I believe is dated June of 2012.

MS. ALCABES: Your Honor, I -- I thought that we kind of dealt with this whole issue and the R.F.A.s that you just directed us to respond to, which is, say yes or no. Either you have the documents or you don't have the documents. After having gone through a thorough search, so, I will -- I think, again, we are willing to say what we have found and what we haven't found, so for us to -- to definitively say what we got from third parties, we just can't do that.

THE COURT: Well, Ms. Alcabes, let me ask you this. I get that if you're talking about, you know, the '70s, the '80s when maybe none of this was really an issue on anybody's radar screen but it sounds like starting in the '90s, there's some -- some documentation that provides Utica with some greater clarity as to what it requested and what it might have gotten. Is part of your issue that -- the lack of a timeframe in these requests?

MS. ALCABES: I guess -- I think the issue is that if there are documents that indicate one way or the other that requests were made and, you know, those are documents that obviously will speak for themselves, and, you know, R&Q has been able to depose a lot of witnesses about these issues, and to ask whether -- to come out and answer this request for admission one way or the other, it just seems to be asking us to take an unreasonable step further.

THE COURT: Okay. So let me look at some of the specific ones here, first, it numbers 30 through 37. The request for admission reads, and I'm quoting, "Burnham has not provided Utica with a complete copy of the primary policy that Utica issued to Burnham effective for all or any part of the period January 1, 1976, to January 1, 1984, and it seems to me that Utica should be able to provide a qualified admission or denial about whether Utica provided or, I'm sorry, whether Burnham provided Utica with documents embodying some or all of the terms of the primary policies, at least after some date when the documentation indicates that you were making concerted effort to track down the policy documents.

You know, if -- even if it -- a qualified answer that said, you know, we requested documents from

Burnham and we have produced everything that we have, including anything that we obtained from Burnham, I think would go a long way towards providing the information that Mr. Finnegan requests and, you know, if -- unless you think you've got documents from Burnham and don't have them anymore, it seems to me if there's documentation that you made requests, you've got what you got, it's not complete, and so, you know, you've produced everything that you got, including anything you requested and received from Burnham, would be something you can provide in a qualified response which meets the substance of it better than your general lack of knowledge or information sufficient to allow you to admit or deny.

Now, I admit if you're going back before a period when there's any documentation you -- lack of knowledge may make sense, may be fair, I can't draw the line as to where but it seems to me you ought to at least be able to say, you know, we requested documents from Burnham and we provided all of the policy documents that we had or obtained from Burnham or from, you know, we are going to talk about A&A later, but -- so, I'm going to require further qualified response I guess for 30 to 37, along those lines, with the caveat that there may be an earlier time period in which denial of --

complete denial of -- the complete denial of knowledge or information may be appropriate.

With respect to 48 to 55, that's essentially the same request for Alexander & Alexander. Again, I think you may be able to make a similar response. You know, we requested information from Alexander & Alexander to the extent there's documentation that's suggesting that, we provided everything we have got, whether we got it from -- whether it was in our files or whether it was received from Burnham or Alexander & Alexander.

With respect to 39 to 46, I know I'm jumping around a little bit here, 39 to 46 reads, and I'm quoting, "Burnham has not provided Utica with any underwriting records for the primary policy that Utica issued to Burnham effective for all or any part of the period from again from January 1, '76, to January 1, '84."

You made a denial of that but then in response to 57 to 64 claimed a lack of knowledge with respect to Alexander & Alexander. I'm trying to understand why you were able to make a substantive response with respect to Burnham but not to Alexander & Alexander.

MS. ALCABES: Your Honor, this is Elisa. I'm going to let Chris answer this because he was involved

in that.

MR. LEE: Yeah, your Honor, I believe the record is -- is clear with respect to what Burnham -- we have a better sense of what Burnham provided to Utica. I think it's a little less clear as to what, if any, underwriting records specifically Alexander & Alexander may have given to Utica.

THE COURT: All right. But is -- is it clear that you request that Utica requested underwriting documents?

MR. LEE: I think we need to go back and check but I think with Your Honor's guidance on some of the other requests that we have -- that we discussed, I think that we have a clearer sense of what we need to do going forward.

THE COURT: Okay. So the idea is, even if you're not sure what you've got, if you made a request and can represent that or admit that you have -- you know, you turned over all the underwriting documents that you got and including any that you may have received from Alexander & Alexander that may be a fairer response than just a complete denial of knowledge or information.

MR. LEE: That makes sense, your Honor. Thank you.

THE COURT: Okay. In light of what I've required with respect to these others, I'm not going to require further responses to 38, 39 through 46, 47, 56 and 65. Based on the -- the more fair responses that I'm requiring of the others because I think they are largely overlapping or duplicative. Okay? Any need --

MS. ALCABES: Thank you, your Honor.

THE COURT: -- any qualifications or questions with respect to that batch before I go on to the next?

MS. ALCABES: I think we are clear. Thank you, your Honor.

THE COURT: Okay. Next group involves Utica's alleged ability to identify employees involved in certain functions and these include questions 66 to 73, 76 to 83, 86 to 94 and 122 to 131.

So we will start with 66 to 73, which I'm quoting: "Utica is unable to identify by name which of its employees participated in underwriting and/or issuing the primary policy that Utica issued to Burnham effective for all or any part of the period, again, talking about the '76 to '83 primary policies." Utica's response is that -- quoting, "Utica admitted that after conducting a reasonable search, it has not been able to definitely identify by name all Utica employees or former employees who had any involvement in the

underwriting or issuance of the primary policy that Utica issued to Burnham effective for all or any part of the period," closed quote.

So, did R&Q actually propound discovery demands seeking to identify which Utica employees were involved in the underwriting or the issuance of these policies?

MR. FINNEGAN: Certainly by asking them to produce the policies and the underwriting files, we certainly sought that information and since the policies had been produced and in complete fashion, since no underwriting files have been produced, we cannot determine who the underwriter was for the vast majority of these policies and I don't think anybody, based on the documentation that's available, can determine who underwrote any of these or the vast majority of these policies and that goes to the very heart of this, which is, if they're going to be claiming scrivener's error and all sorts of other things, if they can't even tell me who participated, I think that undermines the assertion that there was a mistake because they can't even go back to figure out who did it.

THE COURT: All right, and without -- did Utica identify anybody who was involved in the underwriting or the issuance of these policies by name?

MS. ALCABES: Your Honor, I believe unless there's something clearer in the documents, we are not aware of any specific identification.

THE COURT: Okay. All right. So I think basically the one change that you need to make to the responses, the 66 to 73, is to say you've not been definitively -- not able to definitively identify by name any Utica employee or former employee who had involvement in the underwriting or the issuance of the primary policy.

You know, I think the qualifying phrase definitively identified by name is reasonable given the difficulty of figuring out which group of underwriters or other clerical employees who were involved with the particular insured or particular policy more than 30 years ago but unless Utica has definitively identified somebody, it seems to be "all" needs to be changed to "any".

MS. ALCABES: We understand, your Honor. We think that's reasonable. Thank you.

THE COURT: So number 76 through 83 and 86 through 94 are similar questions but relate to whether Utica has identified employees involved in the rating or marking up the primary policies.

Utica objects to the terms "ratings" or

"marking up" as vague and ambiguous and response to these using the same terminology it used in the prior request 66 to 74 as in terms of people involved in the issuance or the underwriting. The definitions of these terms and R&Q's request seem fairly clear and they appear to be commonly used in the insurance industry, as reflected in R&Q's Exhibit 1 paragraph 22 and 23 at page 7 docket number 109-3 of 8.

Arguably, both functions, rating or marking up would be included in the broader terms of issuing an underwriting and are duplicative but the persons involved in these more specific functions would presumably be more likely to have information about why explicit products aggregate limits were not written on some of the primary policies.

So I'm -- I guess I'll start with the question: I'm assuming if you couldn't identify anybody definitely who was involved in underwriting or issuance, you also couldn't identify anybody who was involved in rating or marking up.

MS. ALCABES: Your Honor, I think -- I mean, it seems to me, given your comment, that perhaps the best way for us to deal with these are just to refer to our response to 66 to 73.

THE COURT: Well, yeah, except I think you

also need to be responsive to the more specific terms of rating or marking up. I mean, in other words, I don't think those terms are vague or ambiguous. You know, I am presuming, based on the definitions from R&Q, and I think it's a reasonable presumption that, you know, those are sort of relatively clear functions and, you know, the bottom line is, you can't figure out at this point who did that back then.

So I'm just saying same response but you can't just say not -- don't know who was involved in underwriting or issuance. You've got to incorporate the specific phrasing in the questions in terms of rating or marking up.

MS. ALCABES: We understand.

THE COURT: Okay. I guess the other thing is, again, if you didn't identify anybody, then you've got to change --

MR. FINNEGAN: "All" to "any".

THE COURT: "All" to "any". Thank you. All right. Next group is requests relating to the alleged absence of aggregate limits in the primary policies or products aggregate limits in the primary policies, requests number 97 to 100, 101 to 104, 105, 106, 108 to 115, 116 and 122 to 131.

This series of requests asks in a number of

different ways about the apparent omission or absence of an explicitly stated products aggregate limit in some of the Utica-Burnham primary policies.

Utica's response includes various objections, including the arguments that R&Q's request to rely on a false premise that the policies lack products aggregate limits, Utica doggedly repeats its mantra that none of these policies lack such limits, notwithstanding the absence of certain language or dollar amounts in the policy documents.

In my view, Utica has clearly evaded responding to R&Q's more specific efforts to ask about the omission of dollar amounts for products aggregate limits in some of the policies.

I recognize that the alleged absence of these limits in some of the primary policies is a hotly disputed issue that is critical to the claims and defenses in this case. However, as I stated earlier, the fact that an issue or -- is disputed or central to the litigation does not permit a party to avoid admitting a request for ignoring or evading the factual substance of that request. The request that provides the most specific and objective description of the admission of a stated or explicit products aggregate limited and which best highlights the evasiveness of

Utica's response are number 101 through 104, involving the '80 to '83 primary policy. The request is that -- I'm quoting, "the primary policy that Utica issued to Burnham for the period and, again '80 to '83 policies, lacks a specific, I'm sorry -- lacks a stated products aggregate limit, particularly, the space in front of the word 'aggregate' or 'blank comma 000 aggregate' in the limit of liability section is blank," closed quote.

Utica's response is that Utica denies that the primary policy that Utica issued to Burnham for the period or any part thereof lacks a products aggregate limit. The extent these requests characterize a document, Utica refers to that document for the complete and accurate contents thereof," closed quote.

Utica's denial that the policies lack products aggregate limits, in my view, evades the parts of the request that asks for Utica to admit that a specific spot on one of the policy forms was left blank for several years.

The Booth Oil, which I cited earlier, indicates that Utica's effort to evade responding to the specifics of such a request and its efforts to object by saying, in essence, that the documents speak for themselves are not proper objections under Rule 36. Booth Oil, 194 F.R.D. at 80, which denied objections to

request for admissions about language in a business agreement, and I'm quoting, "on the grounds that they seek an opinion, the termination of a document and that the document, which is the object of the request, speaks for itself," closed quote.

The Court in Booth Oil continued. I'm quoting again, "As a statement of a document" -- I'm sorry. "As a statement of a document's text is a matter of fact, a request calling upon a party to admit or deny that such quoted material is the actual text of an identified document, relevant to the case, may not be ignored on the ground that the request seeks an interpretation of the text or that the document in question speaks for itself. It is permissible to request that a party admit or deny a Rule 36 request as to the accuracy of the quoted textural material from a particular document relevant to the case." That's Booth Oil at page 80.

Now, I understand completely that Utica contends, and has successfully argued in other cases, including in connection with the Goulds Pumps primary policy with similar blanks or omissions that the parties to the agreement intended that they have specific products aggregate limits.

So I would interpret the request in a more limited fashion or maybe more appropriately allow a

qualified response in a more limited fashion in that, you know, the primary policy lacks a stated products aggregate limit in that, the space in front of the word "aggregate" or "000 aggregate limit" section. I guess what I'm saying is -- I'm sorry. What I am saying is that Utica cannot ignore the specifics of the factual question there in terms of blanks in a particular place on the form by just invoking -- meant to have limited or intended to have limits but it does not have to necessarily adopt the specific phrasing of -- does not have to suggest that the blank is a -- one example of ways in which the policy lacks a stated products aggregate limit.

So rather than saying more particularly, the space is blank, they can say it lacks a stated products limit in that the space in front of the word "aggregate" is blank.

So with respect to the many other questions of this sort, again, Ms. Alcabes or Mr. Lee, I take it the omission or the blanks not filled in for the products aggregate limit took a slightly different form in some of these other policies?

MS. ALCABES: I'm sorry, your Honor. I'm not sure I follow. I think in terms of the --

THE COURT: Here, let me try. You asked a

very specific question for the '80 to '83 policies, that there's a particular blank on the form and it's not filled in. You don't ask the question in the same way with respect to other years. So I'm assuming that there was some change in the wording of the form and, you know, they -- it's still not an explicitly stated numerical amount for a products aggregate but it may be reflected in some different fashion.

MS. ALCABES: Are you directing this question to R&Q?

THE COURT: Yes.

MS. ALCABES: Okay.

MR. FINNEGAN: The answer is yes. It's our understanding that, over time, there were at least two different versions of an endorsement that were used.

We can establish, based on the limited policy documentation that has been produced with respect to '80 to '83, that the endorsement in those years was what Utica called their L-203 endorsement. I believe, based on other documents, that the same endorsement may have been used as early as 1977 but since I haven't seen what specific document was used there, I couldn't tie it directly to the L-203 and had, instead, to ask the question more generically because we are both functioning in the blind in terms of what endorsement

was actually appended to that policy and can only rely on extraneous documents to tell us that whatever the endorsement was, it contained a stated aggregate limit.

THE COURT: Okay. So not only -- so in some cases, the key forms for particular years may not have been produced.

MR. FINNEGAN: That's correct.

THE COURT: And then starting in the '84 primary policies, there now starts to be an explicitly stated dollar amount for the aggregate products, aggregate limits? Is that sort of in the same form that we're -- that was used in '80 to '83 or do they change the form as well?

MR. FINNEGAN: My recollection is that in '84 they may have switched over to the -- I'm going to get it wrong -- the GL0099 or 19 form or something like that. My -- my belief is that they did switch. There were different forms in either '84 or '85.

THE COURT: Okay. Is there other discovery in this case in which Utica's representatives appear to acknowledge the absence or the omission of a stated dollar amount for these products aggregate limits in some of these other primary policy where you either don't have the forms or the -- or the format of the forms might have been different?

MR. FINNEGAN: There are multiple documents that refer to it and I believe, depending on the witness -- for example, I think Mr. Turi has characterized it as the documentation issue but he does -- he, too, acknowledges that there are -- there is not an explicit aggregate limits stated in a host of policies.

THE COURT: Okay. All right. So let me circle back now to some of the other requests in this category. Starting with 97 to 100 which states, where the request states, and I'm quoting, "The primary policy that Utica issued to Burnham for the period January 1, '76, to January 1, '80, which would be the '76 to '79 years, lacks a stated products aggregate limit."

So, obviously the question is posed more generically because it's less clear what form was used or, you know, what was -- what blank wasn't filled in. Not having seen the other discovery that reflects the lack of a specific or stated products aggregate limit, I think Utica has to come up with a qualified response which perhaps uses different phrasing than a stated products aggregate limit because maybe that's somewhat debatable and -- but I think something like, you know, you would need to admit or deny whether the policy and I'm -- this is language I'm suggesting, lacks an

explicitly stated dollar amount for products aggregate limit.

I would think the need to be a reasonable, more generic phrasing that you would either admit or deny. Now, there may be room for qualification, you know, to the extent the key documents -- the key policy documents are missing and the other discovery may be more ambiguous. So I'm not ruling out the possibility that in some cases you might, you know, not be -- you might not have knowledge or information or you might deny or you might admit but it seems to me you can't just avoid responding to all these questions because you think stated products aggregate limit is ambiguous or too general.

So, again, I'm not telling you exactly what phrasing to use but lacking in explicitly stated dollar amount for the products aggregate limit would seem a reasonable way to respond to the gist of the request in 97 to 100.

MS. ALCABES: Your Honor, we understand where you're going with this and we appreciate the guidance. We will -- we will confer with our client as to the formulation that we think may be appropriate. We are not going to admit that these policies have no aggregate limit. So, you know, at the end of the day, there is no

admission that -- that the primary policy don't have aggregate limits but we can figure out a way to formulate it in a way that's more satisfactory to R&Q.

THE COURT: Okay. But I guess, you know, it's not a -- it's not a question of satisfied. The question of answering the question and if the question is, is there a blank on this particular form for this year and that's -- there is a blank on the form, you can't evade that by saying, well, we all intended to have one, essentially.

MS. ALCABES: I understand.

THE COURT: Okay. 105 and 106 seek admissions that one or more or all of the '72 to '75 policies lack a stated products aggregate limit. Again, I'm going to overrule the relevance objection to the earlier years, and I would require a less evasive response from Utica with respect to the earlier policies but I understand. I proposed, you know, an example of generic language that I think might be more responsive but, again, depending on what documentation exists with respect to the earlier policies, I'm not precisely dictating how Utica should respond to that.

You know, for example, the fewer policy documents that are found or the fewer other discovery documents that relate to the earlier policies may

provide an ample basis for denying knowledge or whatever but you can't just ignore the phrasing of the -- of the question.

108 to 116 seeks an admission that -- and I'm quoting, "the available documentation evidencing each of the 1972 to 1983 policies lacks a stated products aggregate limit." This request would seem to be duplicative and unnecessary except to the extent that Utica is going to qualify its response to the other prior requests that we have just discussed on the basis that the relevant portions of these policies still have not been located. So if Utica doesn't qualify its responses based on missing policy documents, I would not require a further response to these requests.

Utica contends that the word or phrase available documentation evidencing and stated product aggregate limits are vague and ambiguous. To the extent Utica has to respond to these because a qualified responses to other requests, I would allow Utica to use phrasing, for example, currently available documentation establishing or embodying the terms of the primary policy lacks an explicitly stated dollar amount for products aggregate limits or words to that effect.

Utica might also reasonably further qualify its response by stating to the extent it's applicable

that portions of a particular policy relevant to a products aggregate limit are not currently available or not been located after a reasonable search.

Request 122 to 131 requests Utica to admit that it cannot identify by name the individuals who made the scrivener's error that resulted in the omission of a stated products aggregate limit in the '72 to '83 policies. Utica responded, as it did in respond similar questions about the identify of employees with knowledge, that after conducting a reasonable search, it has not been able to definitively identify by name all Utica employees or former employees who had any involvement in the underwriting or issuance of the primary policies.

I will discuss in a moment in connection with later requests the reference to the scrivener's error explanation that Utica has provided in another litigation with respect to the explicitly -- the lack of explicitly stated dollar amounts for products aggregate limit.

While Utica need not expressly respond to that phrasing, it cannot ignore that R&Q is asking about the identity of Utica employees responsible for the lack of an explicitly stated dollar amount for products aggregate limit in certain of the Utica-Burnham primary

policies who may well be, but are not necessarily, the same people involved with issuing and underwriting the policies.

So Utica is directed to provide a qualified response using reasonable or appropriate phrasing with respect to the identity of the employees responsible for the clerical or documentation or scrivener's error resulting in the lack or the omission of an explicitly stated dollar amount or the products aggregate limit in certain of its primary policies.

As with earlier responses of this type, Utica will be required to state that it couldn't identify any involved employee unless it has actually definitively identified such employees by name in connection with prior discovery.

All right. Let's take another three-minute break and then hopefully we can get the rest of this wrapped up. Okay?

MR. FINNEGAN: Thank you, your Honor.

MS. ALCABES: Sure.

(Pause in proceeding, 3:20 P.M.)

THE COURT: So now looking at requests regarding Utica's litigation position, in particular, number 118 to 120. Requests 118 to 19 asks Utica to admit that its, and I'm quoting, "Its position in this

action is that each of the '72 to '83 primary policy provides for a products aggregate limit of liability. With respect to those years, Utica admits that the policy contained a products aggregate limit."

I would think that the phrasing would seem to suggest an inaccurate overstatement as to the wording of the primary policies that Utica might be well advised to reconsider but, as I said earlier, my role at this stage is not to rule on the factual accuracy of the responses, so I'm not going to direct you to do that. I just -- you know, given what we've talked about in terms of phrasing, you may want to think about a more precise answer but I'm not going to direct that because, again, you've made a -- you've made a response that I'm not going to get into the accuracy of.

With respect to the '72 to '75 policies, Utica repeats its prior objections based on relevance which I would overrule, same reasons stated earlier, and require a response which presumably would mirror the response that Utica made with respect to the '76 to '83 policies whether, as originally stated, or as they might reformulate it.

To the extent Utica is objecting to the phrase "products aggregate limits" as vague and ambiguous, I overruled that objection. Request number 120 asks Utica

to admit its, and I'm quoting, "position in this action is that several primary policies lack a stated products aggregate limit due to a scrivener's error or, as Bernard Turi testified during his deposition, due to an documentation error or documentation issue."

Based on my prior discussion, Utica's response that the policies contain a products aggregate limit is not reasonably responsive for the phrasing of the question. Utica is directed to make a qualified denial or admission to the request along the lines that one or more of the primary policies lacks an explicitly stated dollar amount for products aggregate limit because, and then phrase Utica's explanations that the purported clerical error in whatever terms are accurate and reasonable and appropriate.

I -- you know, I don't think you necessarily have to adopt Mr. Turi's particular language as speaking for the entity or the scrivener's error that you may have used in the Goulds litigation but I think you have to acknowledge that there's some critical mass of statements attributable to the Utica agent, that there was some sort of error or oversight in however you characterize it. I think you can't just avoid admitting or denying that there was some sort of error or oversight that resulted in the lack of explicitly stated

dollar amount in some of the policies.

All right. The next category is further requests regarding Utica's claim of scrivener's errors, requests 132, 133 to 136, 137 and 155. R&Q in this series of requests attempts to get Utica to admit that it has no evidence beyond the conclusory post-hoc speculation of certain witnesses to explain the lack of an explicitly stated dollar amount for products aggregate limits in certain of the primary policies.

The series of requests is, in my view, poorly phrased and Utica's objections that the questions are vague are, for the most part, reasonable. The clearest request, in my reading, is number 132, and Utica's denial that any of the primary policies lack a products aggregate limit evade this request in the same fashion as do many of the Utica's prior responses.

So I'm going to direct that Utica provide a qualified admission or denial of 132. Again, the response cannot ignore the focus of the request on the lack of an explicitly stated dollar amount for products aggregate limit in one or more of the primary policies.

As with some of the prior requests, Utica does not necessarily need to adopt the scrivener's error or documentation error language of the request but must address whether Utica has an explanation why an

explicitly stated dollar amount for products aggregate limit in one or more of the primary policies was not included.

I will not require a further response to number 133 to 136 or 137 based on the unclear drafting of those responses to my requirement that there be a further response to number 132. With respect to 155 seeking an admission that Utica did not seek to determine whether primary policies for insures other than Burnham and Goulds lack explicitly stated dollar amount for products aggregate limit, I will not require a further response. I believe that I have previously taken the position that discovery about whether policies with other insureds lacked such limits was not proportional given the volume of discovery on that issue available to the defendant regarding limits in the Goulds Pump policies.

Requiring Utica to conduct the investigation necessary to respond with respect to other insureds in connection with request number 155 would also not be proportional and would be unnecessarily burdensome on Utica, in my view.

The next --

MR. FINNEGAN: Your Honor --

THE COURT: Go ahead.

MR. FINNEGAN: Would it be appropriate for me to ask you to reconsider your ruling with respect to request 136? And what I'm trying to get at, and maybe you're right, but some of the others were poorly phrased, but the point is very simply that there's a series of policies that lack a stated aggregate limits, explicit aggregate limits.

What I want to get across is that Utica can't tell us today whether the same mistake was made in each of those policy years or whether a different mistake was made in different policy years and as I said, you know, you may disagree with our phraseology but I think 136 is pretty clear in that respect in trying to get Utica to acknowledge that today it can't tell me whether it was the same or different error that resulted from year to year.

THE COURT: Okay. But, you know, I think the bottom line is, they're probably going to admit that they cannot explain the error at all, so that presumably -- their response to 134 I would think would make 136 duplicative and, with all due respect, I don't think the phrasing is all that clear. I get it. Was it the same screw-up or different screw-up over a period of eight or ten years or whatever it was, but the bottom line is, they don't seem to have a very good handle on

that.

So, I'm giving you one question where I think they're going to have to respond to that one way or the other and the others phrase it in less elegant ways that I don't think it's going to bring any clarity to the subject.

MR. FINNEGAN: Can I take a crack at one more and maybe at the end of this I'm going to feel like "Casey at the Bat" and I just keep swinging and striking out but with respect to 155, we're not asking them to go back and conduct an investigation. We -- we don't believe that they ever did try to seek if other policies lack an aggregate limit and the reason that becomes important is their witnesses want to be able to testify, oh, well, we never did this. Well, surprise, surprise. They're too big asbestos insured, Goulds and Burnham. They are going to have the same problem in both policies, no aggregate limit.

If a rational, a good company would reflectively have gone back and said we are going to see how big this problem is so we can contain it and see if this was done with respect to any other policies.

All I want them to acknowledge is they never did what I believe a rational company would do and try to find out how pervasive the issue was.

THE COURT: Never since when?

MR. FINNEGAN: Never since 1985 when they -- they first identified that there was an absence of an aggregate limit in the Burnham policy.

THE COURT: Yeah. Well, I mean, so you're talking about 30 years ago? Right? And how are they going to figure out that they never looked into it for some other insurer when all the employees are long gone, they haven't necessarily done document discovery with respect to the other insurers because there hasn't been litigation? I don't see how you can say that it doesn't require extensive investigation for them to be able to admit or deny that question.

MR. FINNEGAN: Because the people that have been handling the claim, Mr. Turi in particular, both with respect to Gould's and with respect to Burnham, had been involved with the -- with the claims from the get-go. If they had conducted an investigation, a broad-based investigation to determine if it existed in other policies, they would have said so. They would have been able to be in a position.

And I'll tell you, I've already asked in that -- at the end of the day, I already know the answer is because in the -- in the Gould's arbitration, I had the opportunity to ask a whole bunch of them: Did you

ever do this? You know, you take the stand and you tell me, well, we never had this type of problem and that's all fine and good. That's -- I tell the panel: Did you ever go back to investigate whether you had that issue in another? No, we never did that.

So I already know what the answer is. That's why I want to do it now because they know what the answer is too.

THE COURT: Okay. You know, then maybe you should have phrased the question a little more specifically in terms of some of the people who made that admission. I mean, one of the problems that have when you are making a -- asking a question or posing a request that reflects the state of mind of an entity is, you know, it's -- obviously the state of mind of the entity is somehow based or related to the state of mind of the agents or employees but, you know, Bernard Turi or whoever it is that you may have talked to or deposed in the prior litigation isn't necessarily the one who determines the state of the minds of the entity and particularly when you're talking about a 30-year period, pretty tough thing to answer. Dually noted. Strike three. You used your "Casey at the Bat" analogy. All right.

You only get one at bat so I'm now going to

turn to request regarding the drafting of the umbrella policies, request number 185 and 186. 185 seeks an admission that Utica was unable to identify by name the individuals who drafted particular language in the 1977 to 1985 umbrella policies.

Utica's response is similar to the prior responses seeking to identify employees involved in other activities involving the primary policies. For the same reasons discussed in connection with prior requests, Utica should respond that it has not been able to definitively identify anyone who was involved in drafting this language if they have not, in fact, identified anyone by name in connection with prior discovery.

Request number 186 is poorly drafted in part because it does not specify a timeframe during which Utica might have communicated with someone involved in drafting the particular language of the umbrella policies of the '70 and '80s and it doesn't specify the nature of the communication it is asking about. Presumably, somebody from Utica would have communicated with the persons involved in drafting the umbrella language at least when the language was drafted more than 30 years ago, but reconstructing such communications now would be unduly burdensome.

So I'm going to sustain Utica's objections and won't require a further response by Utica to number 186.

The next group of the requests relates to Utica's practice of paying defense costs under its umbrella policies, request number 189 to 193. Number 189 requests an admission to the following statement: Quoting, "where an umbrella policy contains language identical to Section II of the 1977 to 1985 umbrella policy jacket, the practice within Utica is and always has been to extend coverage for defense costs to the insured under the umbrella policy following exhaustion of the underlying primary policies limits, that, in parentheses, defined the term defense costs practice." Utica has objected to this request on a variety of grounds, including vagueness and incomprehensibility and relevance."

So, are we talking about the coverage-by language in the umbrella policies or something else?

MS. GOLD: Yes.

THE COURT: And has Utica, in fact, contended in this or related litigation that it has always paid defense costs under the umbrella policies that R&Q reinsured when the limits of the underlying policies have been exhausted as R&Q claims in its brief?

MS. GOLD: Your Honor, this is Allison Gold.

Yes, it's my understanding.

THE COURT: All right. And how and where has it made that contention? Allison, now I'm confused. How and where is it made that contention or to the extent that you can tell me?

MR. FINNEGAN: If it's okay, I will chime in again, but it's made that contention in deposition, it's made that contention in various of -- I believe some of the discovery briefs that have been admitted to this Court and certainly made that contention in its mediation statement.

THE COURT: Okay. So, how does the language of Utica's prior statements of its position differ from the language of this request, if at all?

MR. FINNEGAN: I'm not sure that it does.

THE COURT: Okay. And from Utica's perspective, I mean, has Utica taken the position that it's consistently interpreted the covered-by language to require that it paid defense costs under the umbrella policies when the limits of the primary policy's been exhausted?

MR. LEE: I think the issue -- this is Chris Lee from Simpson. I think the issue, your Honor, is that -- so if you look at request 189, it's talking about every possible policyholder that Utica has ever

issued umbrella policies for and so, you know, while we have consistently taken that position with respect to the Burnham account and while we believe that that's been the case, I think to try to confirm that and admit that conclusively in the context of this request is just unduly burdensome and we think outside the scope of what their Rule 36 requires.

MR. FINNEGAN: If this Court will give us a ruling right now that their witnesses can't take the stand and make broad pronouncements about what they did with regard to other policyholders and that their only position is that they have done it consistently with regard to Burnham, I'll take that. Because the fact is, the reason for asking this is their witnesses come up and it's -- this is what we did with everybody.

So I want to find out whether that's true or not. I'm entitled to that. They're -- once they make that statement, I'm -- I should be given some leeway to get there.

THE COURT: I guess -- I guess what I'm suggesting here is that there are two ways to ask this question. You know, one is in terms of has Utica taken the consistent position that it has interpreted this language, this covered-by language to require that it pay defense costs under certain circumstances and the

other is with -- your questions are in terms of what was its practice and, you know, it gets into I think a much broader inquiry whether its actual payment practices across the board were consistent with that interpretation and, you know, we have had similar discovery disputes in the past in terms of, you know, whether Utica has or -- has acted may have gone for both sides of the -- of the actions but, you know, whether an insurer or reinsurer has been consistent in applying its supposed uniform interpretation of a policy or a certificate in actual practice and it seems to me that that's a -- a pretty burdensome request to the extent it's not narrowed.

On the other hand, Booth Oil case, 194 F.R.D. at 80 to 81, ruled that a party's request to admit their understanding of a business contract meaning or intent of the party is not objectionable. That's a case that stated that the requests at issue do not relate to material which, like a line of lyrical poetry, may be subject to multiple interpretations. Rather, they are directed to business agreements involving the parties to the instant litigation, using standard clauses applied to particulars of the transactions," closed quote.

So, 189 does not seem to ask about the interpretation of the covered-by language. It seems to

ask whether Utica had a consistent practice to actually extend coverage and make payments consistent with that interpretation and suggests that Utica has a duty to investigate whether it actually covered defense costs under these circumstances without limitation to timeframe, identity of the underlying insured or the context of the coverage, whether it's asbestos claims or something else.

So that -- that broad context would seem to exceed the scope of prior discovery in this and other cases and impermissibly use a request for admission is an initial tool for discovery as opposed to tool for narrowing the issues for trial and going back to the Wiwa case, 2009 Westlaw 1457142 at page 4, I think that stands for the proposition that to the extent R&Q is using a request as an initial means of gathering information about earlier policies, request for admissions are not supposed to be used as a primary discovery device but as a way to narrow the -- the motion -- narrow issues for motion practice and trial based on the results of prior discovery.

I also cite the T. Rowe Price Small Cap Funding versus Oppenheimer case, Southern District of New York case 97 174 F.R.D. 38 at 42. So, I'm pretty sure I have not allowed that breadth of discovery in

this or in other cases. So I -- you know, the way you phrased that I don't think works. On the other hand, I would be inclined to require Utica to make a qualified denial or admission to what I would consider a narrower interpretation of the request that Utica has consistently interpreted not-covered-by language or the language of Section 2 of the policy jackets in these particular years, to require coverage of defense costs under the umbrella policies when the limit of the underlying primary policies have been exhausted.

That, to me, the investigation required respond to that request is something that can be done within discovery that's already been conducted and doesn't, you know, require you to go back and search for possible examples where you haven't applied that.

So, whether I'm out of -- modifying the question or whether I'm, you know, allowing a more qualified answer I suppose is -- is a -- is a little unclear but I'm -- I think what I'm -- what I am saying is that I think Utica needs to make a qualified denial or admission with respect to its -- whether it has a consistent position to interpret that language to require coverage of defense costs under the umbrella policy when the limit of the underlying policies have been exhausted.

MS. ALCABES: Your Honor, this is Elisa Alcabes. I think we understand your guidance and we appreciate it but just to be clear, it's not opening the door for R&Q to then go out and ask us for more discovery about how we have handled other policyholder matters.

THE COURT: Right, and I have -- you know, I've -- I don't think in this case but in some of my prior cases I've certainly adjudicated discovery disputes about that kind of discovery and, you know, have not certainly allowed it to the breadth that's been allowed, that suggested by this particular request and, you know, my -- I think it would be fair to say that -- consistent with my best recollection of my prior rulings, you know, I might have -- allow you to reference whatever discovery and -- in the Goulds case may -- may be relevant to this or something like that but I certainly wouldn't open up discovery more broadly than that.

MS. ALCABES: Thank you.

THE COURT: Now, the following question, 190 to 193 asks, you know, the follow-up questions with respect to the defense cost practice which is, you know, which I've essentially recast the -- or narrowed the request. 190 asks Utica does not know when the -- this

interpretation of the umbrella policy language began. Number 191, Utica does not know why this construction of the umbrella policy language was adopted. 192, Utica does not know who made or approved that interpretation of the policy.

Requests like this, which asks for admissions about the knowledge of an entity without limitation as to timeframe, are properly subject to objections. Even if the request was narrowly construed to focus on Utica's interpretation of the key language of the umbrella policies as opposed to a broader practice, a substantive response would appear to require investigation going back 30 years or more through the present which seems unduly burdensome and not proportional to the needs of the case.

It is not clear how Utica should determine when the knowledge of an employee or an agent, assuming it found evidence of such knowledge, should be attributable to the entity. So I'm not going to require further responses to those three requests, even under the narrower construction that we're talking about, the interpretation of the policy language as opposed to the practice of implementing that interpretation.

Request number 193, however, is phrased there are no documents indicating when, why or by whom the

defense cost practice -- I'm sorry -- the defense cost practice was adopted and, again, I would -- construing this more narrowly in terms of the interpretation of the key language. I would say this request is phrased in terms of more objective criteria and not the state of mind of an entity.

So consistent with my ruling on 189, this request narrowly construed to focus on Utica's interpretation of the not-covered-by language of the umbrella policies is something that Utica should be required to respond to.

Given that Utica has addressed the defense cost issue in this and other reinsurance litigation and discovery, it's safe to assume that reasonable investigation has already been made to locate documentary evidence supporting the interpretation of the "covered-by" language that Utica has advanced in this and other litigation.

Unlike 190 to 192, responding to this request wouldn't seem to require interview of former employees but only review of documents that have already been produced in this or related litigation. So I'm going to direct Utica to make a qualified denial or admission to 193 as narrowed but not to 190, 191 or 192.

The next group relates to Utica communications

with Burnham, requests 209, 215 to 217, 223, 229, 230, 252. Request number 209 reads: Utica has never communicated with Burnham regarding the absence of a stated products aggregate limit in one or more of the primary policies Burnham purchased from Utica.

Utica's response: Utica admits that the primary policies are subject to the products aggregate limit and that it has discussed the amount of coverage available to Burnham for the Burnham -- claims with Burnham. Utica's response, like many prior responses to requests in terms of the absence or lack of a stated products aggregate limit is nonresponsive. Consistent with prior rulings, Utica is required to make a qualified admission or denial using phrasing like explicitly stated dollar amounts for product aggregate limits but cannot rely on unresponsive language it has used in its response.

I will consider a possible qualification based on timeframe. It's conceivable that for an earlier, you know, a time period in the distant past, that a denial of knowledge or sufficient knowledge or information after reasonable investigation may be appropriate and, you know, there also could be more recent communications in the last year or so with respect to the settlement discussions where the issues have been clearly

discussed.

And so, the qualifications of the answer might reasonably distinguish between different time periods so as not to support a misleading inference.

Request 215 to 271. Number 215 reads: "Utica has communicated to Burnham the fact that re-insurance is available to Utica on the umbrella policies." Number 216: Utica has communicated to Burnham's Utica's projected reinsurance recoveries on losses and cost allocated to the umbrella policies and other policies as well. 217 reads: "Utica and Burnham have had one or more communications as with respect to the scope of reinsurance that may be available to Utica to cover Utica's loss and expense payments to Burnham in connection with the Burnham claims."

Utica objects that these requests are vague and ambiguous, not relevant and overly broad because they do not specify a timeframe.

Utica also tries to refer R&Q to documents regarding Utica's communications with Burnham rather than characterizing those communications in the responses.

Based on the authority previously cited, Utica's effort to avoid responding to the request by directing R&Q to documents are not proper under Rule 36.

A request that requires Utica to characterize communications with Burnham are not objectionable per se. R&Q seeks these responses to support the position that Utica may have colluded with Burnham to shift the burden of Burnham's claims to Utica's reinsurers.

While admissions to these responses would not necessarily be conclusive on that point, they are sufficiently relevant under the liberal standards of federal discovery which apply to Rule 36.

I do not think the phrasing of the requests are vague or ambiguous but I won't rule out that Utica might appropriately qualify an admission or denial to clarify terms, as long as it does not try to evade the specific focus of the requests.

Finally, as I suggested earlier, I understand that the lack of a timeframe in the request could result in an unqualified response -- could result in an unqualified response suggesting unwarranted inferences. So if, for example, Utica had no such communications with Burnham until their recent settlement negotiation, Utica could qualify its response with respect to timeframes. It may also be, as I suggested earlier, that Utica could deny relevant knowledge or information upon reasonable investigation regarding time periods in the distant past.

Number 223 and 229 are overlapping requests relating to what Utica communicated to Burnham with respect to the lack of a stated products aggregate limit.

Utica's response to 223 in its objections to 229 have the same problems as many of its prior responses to requests regarding the products aggregate limit issue and/or communications with Burnham. Utica is directed to make a more responsive denial or admissions of these requests but, as just discussed, may qualify its responses to deny information or knowledge for different time period if necessary to avoid a response that might suggest unwarranted inferences.

Request number 230. In light of the phrasing of the request that Utica and Burnham never agreed that products aggregate limits would apply to each of the primary policies, Utica's denial in those terms is adequate. Again, I can't, at this stage, rule on this accuracy of Utica's denial.

Finally, with respect -- in this group request number 252, I agree with Utica that the phrasing of this request is vague and ambiguous and, in light of the responses I'm requiring with respect to other requests about communications with Burnham, I won't require a further response.

Request number 219, regarding metal powder or metal power environmental claims. Number 219 reads: I quoting here, "There are one or more written agreements between Utica and Burnham as respect coverage for the metal powder or metal power environmental claim." Utica objects to the request on various grounds, including vagueness, ambiguity, relevance and because it purportedly calls for a legal conclusion.

Did R&Q make a discovery demand for any written agreements between Utica and Burnham with respect to the resolution of this environmental claim?

MR. FINNEGAN: Again, your Honor, I suspect that at the outset of the case we asked for a broad or formulated a broad request for all coverage agreements and that during discovery or during discussions, we would have narrowed it just to those that dealt with asbestos, and the reason for asking this is obviously the folks from Utica are going to be arguing the following applies and what I would like to be able to do, based on the documents that we have received in discovery, it appears that there were at least two different coverage-in-place agreements negotiated and put in place with regard to and -- and the reason for saying metal powder or metal power is that both words are used in the documents.

It appears that there actually was a coverage-in-place agreement put in place, and I'd like to be able to distinguish the existence of the coverage-in-place agreement for a certain environmental claim with the absence of a coverage in place agreement for asbestos.

THE COURT: And did this claim arise under some of the same primary or umbrella policies involved in the asbestos claim in this case?

MR. FINNEGAN: Yes.

THE COURT: Bear with me for a second here. R&Q asserts that the fact that Utica's resolution of a coverage dispute with Burnham over this environmental claim was documented in writing, would be relevant to casting doubt on Utica's implied position that it resolved coverage issues with Burnham regarding asbestos claims under some of the same policies without any written documentation.

So I think R&Q makes a viable case for the relevance of this request. The phrasing of request, however, does not clearly address the relevant issue. Utica arguably would be required to admit the request just based on the fact that there was insurance policies under which the environmental claim arose and it appears R&Q, rather than seeking to confirm a fact indicated by

prior discovery, is trying to overcome a gap in the discovery by using a request for admission in the first instance. So I'm not going to require Utica to make a further request to this request.

The next group is requests regarding Utica's concern about a coverage action with Burnham, requests number 220 to 222. Number 220 reads: "Utica considered but did not pursue coverage litigation against Burnham to determine the parties' respective rights in connection with the Burnham claims." Utica made an unqualified denial of 220.

R&Q questions how Utica could deny this request based on the documentary and other discovery but I am not supposed to evaluate the veracity of a denial or admission at this stage. I would note that when a question like this focuses on the state of mind of an entity, the entity would have some wiggle room in not adopting the position that some of its employees or agents may take.

Number 221 reads: "Utica was concerned that if it pursued coverage litigation against Burnham, Burnham might assert that one or more of the primary policies Burnham purchased from Utica lacked a stated products aggregate limit."

Utica's response was that, quoting, "Utica

admitted that one or more of the Utica employees and/or agents considered the possibility of potential coverage litigation with Burnham, including the issues that Burnham could seek to assert."

Utica's response in terms of its employees or agents is not inappropriate when the state of mind of an entity is being explored. If, as R&Q suggests, there is documentation that some of Utica's employees or agents expressed the concerns reflected in the request, Utica cannot evade a substantive response on that point.

Similarly, if there is documentation that some of Utica's employees or agents considered whether, if faced with a coverage action, Burnham might assert the issue of whether certain primary policies lacked explicitly stated dollar amounts for products aggregate limits, Utica cannot evade a response on that issue by a more general reference to issues Burnham could seek to assert.

Request number 222. "Utica sought to avoid a broad coverage action with Burnham in which the existence of products aggregate limits might become an issue." Utica's response: "Utica admitted that, everything else being equal, it prefers to avoid litigation but denied it sought to avoid any appropriate coverage action with Burnham."

Again, because the focus of this question is on the position of the entity, I don't think I can address the accuracy of Utica's denial. The revised response to the prior request should address whether employees or agents of Utica considered whether, if faced with a coverage action, Burnham might assert the issue of whether certain primary policies lacked explicitly stated dollar amounts for products aggregate limits.

Assuming Utica adequately responds to that aspect of number 222, I won't require a further response to 223.

However, if Utica doesn't address that issue in response to 222 because of issues with the phrasing in terms of concerns of Utica or its employees, I will require a further response to 223.

If there is documentation that some of Utica's employees or agents recommended avoiding a coverage actions because Burnham might assert the issue of whether certain primary policies lacked explicitly stated dollar amount for products aggregate limit, a qualified response in terms of its employees or agents on that point would be required.

MS. ALCABES: Your Honor, I might think you might have misspoken on the numbering. I think -- I

think you're ruling that if we answer to 221, that our answer to 222 could stand.

THE COURT: Okay. I think you are -- no, I talked about 222.

MS. ALCABES: Actually, talking about 223 and I think you mentioned it.

THE COURT: Okay. Hang on a minute. I'm running out of gas, as you can perhaps tell here.

MS. ALCABES: If I understood you correctly, I think you were saying that 221 we should clarify our answer. And if we clarified our answer to 221, then 222 could stand.

THE COURT: Yes. No, I -- I think and I -- I may have gotten lost in translation. I did suggest the qualified response to 221 would be required and then 222 is Utica sought to avoid a broad coverage action with Burnham in which the existence of products aggregate limits might become an issue and I said that the revised response -- yes, to 221. Yeah, okay. The revised response to number 221 should address whether employees or agents of Utica -- yes. So you're right.

So I'm saying basically if you adequately responded to 221, you don't need a further response to 223.

MR. FINNEGAN: 222.

MS. ALCABES: 222.

MR. FINNEGAN: I think the parties are in agreement, your Honor, that you meant to say 222.

THE COURT: Okay. Yes. 223 is not even in this group.

MS. ALCABES: Yes.

MR. FINNEGAN: You're correct.

THE COURT: All right. I'm glad somebody is checking my math here. All right. So you don't have to respond to 222 if you cover that ground in 221.

MS. ALCABES: Thank you.

THE COURT: Thank you. All right. We are getting close to the end here. Thank goodness.

The next group requests for coverage opinions regarding defense costs. Requests 239, 240 and 242 to 246. Requests 239 reads: Following receipt of Resolute's February 2008 inquiries about Utica's obligation, if any, to pay defense costs under the Goulds' umbrella policies, Utica for the first time asked outside counsel to assess whether Utica had an obligation to pay defense costs based on Section 2 of the umbrella policy jacket from U/G-P-UL.

Utica objected to the request on various grounds. Utica's request with respect to relevance is overruled. When Utica sought outside coverage advice

about its position with respect to its obligation to pay defense costs under the umbrella policies is relevant, at least by federal discovery standards as to whether that should be enforced under the "follow the fortunes" analysis.

I take it there is discovery from the Goulds cases that indicates that you Utica sought such coverages advice from outside counsel in this timeframe?

MR. FINNEGAN: There's both -- there is both documentation and testimony from Kristen Martin.

THE COURT: Okay. So to extent that Utica objects by referring R&Q to the documents for an answer, that objection is overruled based on the authority such as Booth Oil, and so Utica suggests there may be an invocation of privilege, given their waiver of privilege with respect to coverages issues, I'm not sure how privilege issues would arise. That one is directed to you, Mr. Lee or Ms. Alcabes.

MS. ALCABES: I'm going to let Mr. Lee answer this.

MR. LEE: Sorry, your Honor, give me one second. You know, I think for that one we objected to the extent that it -- it sought it. Sitting here right now, I don't think that was the gist -- the driving force behind that --

THE COURT: Okay.

MR. LEE: -- our objection here.

THE COURT: All right. And I understood what you were trying to do with the false premise objection previously but I don't see that how that applies here.

MS. ALCABES: Your Honor, as I understand -- this is Elisa Alcabes again. They're asking about a timing issue and they're asking us to admit that prior to this time, we didn't consult counsel. I do think it's a little bit of a confusing request.

THE COURT: Okay. Well, I'm going to direct an admission or denial. To the extent Utica reasonably lacks knowledge or information about whether it previously sought advice on this issue in the very distant past, it may be able to qualify the response with respect to the earlier period. But, you know, presumably, Mr. Turi or somebody is going to have a pretty good handle on when they first sought coverage opinions on this. At least, you know, in the not way distant past.

MS. ALCABES: Okay.

THE COURT: Number 240 asks Utica to admit the language of a particular document which authorities such as Booth Oil clearly approved. If Utica still doesn't know what document is being quoted, it can ask R&Q to

supply a copy before responding but I think a response to that substantive response is required.

Utica's objections to number 242 are overruled for reasons previously discussed in connection with the same objection to similar questions. Utica's shall admit or deny whether it ever provided R&Q with a coverage opinion on this specified language of the umbrella policy jacket. If Utica reasonably lacks knowledge or information about whether it provided a coverage opinion to R&Q in the very distant past, it may be able to qualify the response with respect to earlier time periods.

Number 243 completely overlaps number 239 and 242 so I will not require a further response to that.

Number 244 is vague and ambiguous particularly with respect to when coverage advice was not, and I'm quoting, "in connection with potential or actual disputes." So no further response will be required to 244.

Utica is directed to admit or deny number 245 and 246 with a few possible qualifications. If Utica cannot fairly respond in terms of whether it directed the lawyers not to describe the research, it may make a qualified response as long as it doesn't evade the focus of the questions like it -- in the request that advice

as opposed to a directed the lawyers not to do the research, you know, maybe one possibility. Utica may also appropriately respond in terms of what Utica's employees or agents might have done if they had a viable argument that these employees or agents did not necessarily speak for the entity, but Utica's relevance objection to these requests is overruled.

Number 251. I think it's the last one I'm going to address. It reads: "Utica cannot identify any extraneous evidence, whether documentary or otherwise, that reflects an intention by Utica to pay an insured's defense costs following the exhaustion of an underlying primary policy where Utica provided umbrella coverage based upon the language contained in policy jacket form U/G-P-UL."

Utica, I would note, denied 250, which made a much clearer request that Utica could not identify any document other than the umbrella policy jacket form that reflected the intention reflected in number 251.

Number 251 seems to overlap with 250 except that instead of using the term "document", it uses the broader category of extraneous evidence, whatever that may be. So Utica's objection to the phrasing is sound and I won't order a further response to number 251 in light of Utica's response to 250.

So that concludes my discussion of the request for admission. As I said earlier, it would take me a week and a half to try to put this all down in a summary order, so I'm going to require all of you to plow through the transcript and, you know, you have been remarkably attentive and part -- at least one time when I misspoke, and so hopefully that will give you sufficient guidance to resolve the ones that I ruled on specifically.

As I stated earlier, if I didn't make a ruling with respect to a specific request, primarily those noted in footnote 2 of R&Q's belief, then no further request of the brief is required.

I tried, as I said earlier, to be as specific as possible in my rulings but Utica obviously still has to revise some responses based on more general guidance from me. I expect Utica to fairly address the substance of the request as stated where I directed that further responses. If Utica does not and I have to address the revised responses, I will likely direct that admissions rather than a further opportunities to amend its responses.

I will also warn R&Q that any -- it needs to accept that it cannot expect me to require Utica to admit R&Q's expand on every issue that it has raised.

So if I'm required to deal with another motion with respect to these requests for admissions, the parties can expect that I will sanction anyone who has, in my view, acted unreasonably in applying the guidance that I provided today.

So not long ago, I believe Mr. Finnegan filed a letter about the need to expand the timeframe for discovery in light of all the recent developments, including the supplemental production of more than 100,000 pages of documents. I think that is, at least in general terms, is not an unreasonable request.

So I guess my question for the parties is whether we want to get specific about how much time we need to extend the schedule or how much discussion we need to have about the scope of appropriate further discovery or whether it makes sense to have the parties have a little time to digest, for example, the additional discovery that's been provided recently and then confer and see if you can propose a revised schedule.

MR. FINNEGAN: Just so the Court is aware, the parties did have a discussion on Friday where we exchanged thoughts about deadlines. We -- you know, they weren't wildly different but there were differences and we both concluded at the end of that conversation

that it would be best for us to get your rulings today, then confer again and hopefully within a few days provide the Court with an agreed set of deadlines.

So if -- if the Court is amenable, I would ask that we have -- end of this week or early next week to report back on revised schedule for a completing fact discovery, exchanging rebuttal expert reports, and completing expert discovery and filing dispositive motions.

MS. ALCABES: Your Honor, Elisa Alcabes. Yes, we -- we agree with that approach. I think that, given the Court's guidance today, which has been very helpful, I do think that we will be able to come to an agreement hopefully on the date.

THE COURT: Okay. So a week, maybe May 8th? Does that give you enough time or do you need a little more?

MR. FINNEGAN: I would give us to May 8th and if we -- we can't get it done, we will report back to you but, in my experience, we lawyers function better when they have got real deadlines on their plate.

THE COURT: Okay. Is there anything else we need to discuss this afternoon?

MS. ALCABES: No, your Honor.

MR. LEE: Not from our end.

THE COURT: All right. I appreciate your patience as I've droned through all of this. I hope it gives you enough guidance that I won't have to revisit it.

MS. ALCABES: Thank you.

MR. FINNEGAN: Thank you for your diligent review of all the papers, your Honor.

THE COURT: Good afternoon, Counsel.

MR. FINNEGAN: Bye.

(Proceeding concluded)

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C E R T I F I C A T I O N

I, Lisa L. Tennyson, RMR, CSR, CRR, Official Court Reporter in and for the United States District Court for the Northern District of New York, hereby certify that the foregoing pages taken by me to be a true and complete computer-aided transcript to the best of my ability.

Lisa L. Tennyson

Lisa L. Tennyson, R.M.R., C.S.R., C.R.R.